

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 820

10 EAST 40TH STREET BUILDING, INC.,
PETITIONER,

vs.

CHARLES CALLUS, SAMUEL SAID, LOUIS SAG-
GESE, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.**

Civil Action. File No. 19-514

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED
BREGLIA, Joseph Barbara, Gerald Kerr, Peter Ohan, An-
gelo Micallef, Frank Voscinar, William De Troy, John
Michalicka, Isadore, Mika, Jacob Vartabedian, Laurence
Zammit, Julius Orosz, Charles Bonnici, Benjamin C.
Harris, Dennis Shea, Alfonso Chivelly, Thomas Calla-
han, Frank Lange, Frank Colangelo, Salvatore Fiorenza,
Joseph Spiteri, Wally Spiteri, Aziz Kassabian, Albert
Vogel, Paul Chambers, Samuel Mitchell, Peter Macredi,
Eliu Vecchione, Michael Addea, Michael De Troy, Joseph
S. Rayzak, Herbert B. McClelland, Thomas Rosso, Gae-
tano Greck, John I. Ortiz, Gilbert Ortiz, Pasquale A.
Saggese, Edward Killian, James H. Law, George Orosz,
Salvador Sanchez, Robert Murden, John P. Smyth, Fred
Kassab, Joseph Cefai, Joseph Herrera, Emil J. Cisek
and Charles G. Borg, suing in behalf of themselves and
All Other Employees and Former Employees of Defend-
ants Similarly Situated, Plaintiffs,

against

10 EAST 40TH STREET BUILDING, INC. and CROSS & BROWN
COMPANY, Defendants

STATEMENT UNDER RULE XIII

This action for unpaid overtime, liquidated damages
and counsel fee under Section 16(b) of the Fair Labor
Standards Act was commenced in the United States Dis-
trict Court for the Southern District of New York by ser-
vice of the summons and complaint on defendant 10 East
40th Street Building Inc. and on defendant Cross & Brown
Company on November 12th, 1942, and by filing of the
complaint on November 10th, 1942.

[fol. 2] Answers of defendants were filed on December
2nd and 3rd, 1942.

Upon stipulation and order the action was severed as
to defendant Cross and Brown Company and marked off
the calendar.

In order to shorten and facilitate the trial of the action, the attorneys for the respective parties entered into a stipulation dated March 18, 1943, as to certain facts.

Defendants were not at any time arrested nor was bail taken or property attached or arrested; no question was referred to a commissioner or commissioners, master or referee.

Judgment for defendant 10 East 40th Street Building Inc., was entered on June 4, 1943.

By notice of appeal filed on September 1, 1943, plaintiffs appealed from the judgment and every part thereof.

A stipulation dated November 27, 1943, correcting the findings of fact has been entered into by the attorneys for the parties.

Plaintiffs appeared originally by Victor J. Herwitz, Esq., 521 Fifth Avenue, New York City, and defendant 10 East 40th Street Building Inc. appeared by Proskauer, Rose, Goetz & Mendelsohn, 11 Broadway, New York City. Since Mr. Herwitz' induction into the army, Aaron Benenson, Esq., 521 Fifth Avenue, New York City, has been substituted as plaintiffs' attorney. There has been no change of parties or attorneys since the commencement of the action other than the above noted severance with respect to defendant Cross and Brown Company.

[fol. 3] IN UNITED STATES DISTRICT COURT.

[Title omitted]

DOCKET ENTRIES

Date	Filing, Proceedings, etc.
Nov. 10, 1942	Filed Complaint and Issued Summons.
Nov. 14, 1942	Filed Summons and Return—Served Francis B. Herny, Asst. Secy. for 10 East 40th St. Bldg., Inc. 11/12/42, Served Wm. A. Campbell, Exec. V. Pres. for Cross & Brown Co. 11/12/42.
Dec. 2, 1942	Filed Answer of Defendant (Cross & Brown Co.)
[fol. 4] Dec. 3, 1942	Filed Answer of Defendant (10 East 40th St. Bldg., Inc.).
Jan. 11, 1943	Filed Stipulation re taking depositions (defendant 10 East 40th St.)

Jan. 11, 1943—Filed Stipulation re taking depositions (defendant Cross & Brown Co.).

March 16, 1943—Filed Deposition of witnesses upon oral examination before trial (mailed notices).

March 16, 1943—Before Hulbert, J.—Trial begun. Action severed as to defendant Cross & Brown Co. on motion of defendants' attorney.

March 18, 1943—Before Hulbert, J.—Trial continued.

March 19, 1943—Before Hulbert, J.—Trial continued.

March 22, 1943—Before Hulbert, J.—Trial continued.

March 23, 1943—Before Hulbert, J.—Trial continued.

March 24, 1943—Before Hulbert, J.—Trial continued and concluded. Decision reserved.

March 25, 1943—Filed order severing action as to defendant Cross & Brown Company—Hulbert, J. Mailed Notice of Entry 3/26/43.

May 28, 1943—Filed Opinion #14,687 (see Opinion) Hulbert, J.

June 4, 1943—Filed Judgment dismissing complaint as to defendant 10 E. 40th St. Bldg., Inc.—Hulbert, J. Mailed Notice of Entry 6/7/43.

Sept. 1, 1943—Filed Notice of Appeal and mailed copies to Harold J. Treanor and Proskauer, R. G. & M. on 9/2/43.

[fol. 5] IN UNITED STATES DISTRICT COURT

SUMMONS

[Title omitted]

To the above named Defendants:

You are hereby summoned and required to serve upon Victor J. Herwitz, Esq., plaintiffs' attorney, whose address is 521 Fifth Avenue, Borough of Manhattan, City of New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail [fol. 6] to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk of Court. By _____
Deputy Clerk. [Seal of Court.]

Date: November 10, 1942.

IN UNITED STATES DISTRICT COURT

COMPLAINT

I

Plaintiffs bring this action for and in behalf of themselves and in behalf of all other employees and former employees of defendants similarly situated, to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

II

Jurisdiction is conferred upon this Court by Section 41 (8), 28 U. S. C. A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce", without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938.

[fol. 7]

-III

At all times herein mentioned defendant 10 East 40th Street Building, Inc., has been a corporation organized under and existing by virtue of the laws of the State of New York, having a principal place of business at 10 East 40th Street, in the City, County and State of New York, within the jurisdiction of this Court, and defendant Cross & Brown Company has been a corporation organized under and existing by virtue of the laws of the State of New York, having a principal place of business at 220 Madison Avenue, in the City, County and State of New York, within the jurisdiction of this Court.

. IV

Between October 24, 1938 and the present date, defendant 10 East 40th Street Building, Inc., has been the owner of and in possession and control of a forty-five (45) story and basement building located at 10 East 40th Street, New York, New York, and defendant's business has consisted of the management and operation of the building and the rental of space in the building to various tenants.

V

At all times herein mentioned defendant Cross & Brown Company has acted as the agent of and for the account of defendant 10 East 40th Street Building, Inc. in the management and operation of the building, had authority to hire and discharge employees engaged in the operation and management of the building and advanced funds for the payment of employees, and issued instructions to and otherwise controlled, directed and supervised the employees in the performance of their duties; in so doing defendant Cross & Brown Company has acted at all times in the interest of defendant 10 East 40th Street Building, Inc. in relation to its employees.

[fol. 8]

VI

At all times herein mentioned the space in the building has been leased by defendants to and occupied by approximately one hundred twenty (120) tenants, including a substantial number of manufacturing companies and concerns, manufacturers' sales agents, trade associations, wholesalers, jobbers, distributors, importers and exporters.

VII

At all times herein mentioned space in the building has been leased by defendants to and occupied by approximately twenty-five (25) manufacturing companies and concerns, and sales agents of such manufacturing companies and concerns, which have occupied a total of approximately 25% of the space in the building and used the space for their mail, foreign export, personnel, purchasing, accounting, statistical, planning, advertising, publicity, sales, stock transfer, research and other departments and staffs and for their executive offices and showrooms and for the operation of similar facilities.

VIII

At all times herein mentioned such manufacturing companies and concerns have been engaged at factories and plants in various states of the United States in manufacturing and producing celluloid and plastic products and raw materials for use in producing plastic products; spark plugs, batteries, magnetos and other electrical and automotive supplies; ediphoes; cement; cigarettes and tobaccos; women's hosiery and underwear; packing cases and boxes

and parts for use in assembling packing cases and boxes; men's shirts, ties, collars and other men's wear; brass and copper products and other metal products, including plumbing fixtures, electrical fixtures, lipstick and compact cases and similar products; silverware; metal tubes; motors [fol. 9] and engines and parts for motors and engines; radio parts and equipment; chemicals and chemical products; paints and pigments; pulp, paper and paper stock; converted paper products; dental supplies and equipment; aeroplane parts, supplies and equipment; photographic supplies and equipment; clay and terracotta products; food products; bags and containers; textiles and fabrics; and other goods, supplies and equipment. These goods have been produced for interstate commerce and substantial quantities of such goods have been sold, shipped, transported, distributed and delivered in interstate commerce from points in various states of the United States to and through points in various other states of the United States and foreign countries.

IX

At all times herein mentioned the various departments, staffs and facilities of such manufacturing companies and concerns and their sales agents occupying space in the building have engaged there in one or more of the following: in various functions and activities constituting a necessary and essential part of the manufacturing and production for interstate commerce of the above-described goods, supplies and equipment in the various factories and plants of such companies and concerns; in placing orders, executing contracts or making arrangements for the purchase and sale of various raw materials and finished products pursuant to which such raw materials and finished products have been sold, shipped, transported, distributed and delivered in interstate commerce from points in various states of the United States to and through points in various other states of the United States and foreign countries; in the gathering and dissemination of advertising and publicity information and materials and the communication, distribution and delivery of such information and materials in interstate commerce from points in various states of the United [fol. 10] States to and through points in various other states of the United States and foreign countries; in the covering with insurance of the sale, shipment, transportation, distri-

bution and delivery of various raw materials and finished products in interstate commerce; in the financing of the interstate sale, shipment, transportation, distribution and delivery of various raw materials and finished products; in the movement and transmission across state lines of funds and instruments calling for the payment of funds; in the ordering, receiving, handling and shipping in interstate commerce of samples of products produced by such companies and concerns; in facilitating and arranging for the movement across state lines of personnel and equipment.

X

At all times herein mentioned space in the building has been leased by defendants to and occupied by approximately twenty-five (25) tenants which have occupied a total of approximately 20% of the space in the building and engaged there in the preparation and production of, and in other work upon, magazines and publications; blue-prints, plans, designs, drawings, surveys, photostats, specifications and layouts for use in engineering, construction and industrial work; advertising and publicity materials, copy, layouts, photographs and displays; radio scripts; photograph and motion picture films, prints and enlargements; trade association and trade representative's reports, bulletins, digests, analyses, statistical tables and similar publications and materials; credit and collection reports; ediphones and similar equipment; printed and lithograph materials; accounting and financial statements; audits, balance sheets and similar accounting documents; and other goods. Substantial quantities of the raw materials from which such goods have been produced have been purchased, transported and received in interstate commerce [fol. 11] from points in various states other than the State of New York, and substantial quantities of such goods have been produced for interstate commerce and have been, subsequent to the work performed upon them in the building, sold, shipped, transported, distributed and delivered in interstate commerce to points in various states other than the State of New York.

XI

At all times herein mentioned space in the building has been leased by defendants to and occupied by at least ten

(10) tenants occupying at least 5% of the space in the building and engaged there in the purchase, sale, transportation, handling and distribution at wholesale, importation and exportation of men's shirts and other men's wear, women's hosiery and other women's wear; ediphones and other electrical and mechanical equipment and supplies; pulp, paper and paper stock; spices, gums, herbs, kapok, feathers, hides and other commodities; minerals, ores and other mineral products; chemicals, oils and other chemical products; tobacco and cigaretts; textiles and fabrics and textile products; plastic materials and plastic products; photographic supplies and equipment; and other goods. Substantial quantities of such goods have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantial quantities of such goods have been sold, shipped, transported, distributed and delivered in and from the building to points in various states other than the State of New York.

XII

At all times herein mentioned a substantial number of tenants occupying space in the building has regularly and continuously engaged there in the preparation and production of various brochures, bulletins, announcements, pamphlets, reports, digests, analyses, surveys, statistical tables, instruction sheets and other materials mimeographed or otherwise reproduced in the building and, subsequent to the work performed upon them there, sold, shipped, communicated, transported and delivered to various points outside the State of New York; and a substantial number of tenants occupying space in the building has regularly and continuously engaged there in the preparation and production of various purchase and sale orders and confirmations, bills, leases, telegraph messages and confirmation copies, bills of lading, warehouse receipts, shipping documents, checks, notes, drafts and bills of exchange, insurance policies, bond and stock certificates, radio scripts, and various other documents, messages, billings and indicia of title, which have been, subsequent to the work performed upon them in the building, sold, shipped, communicated, transmitted and delivered to various points outside of the State of New York.

XIII

At all times herein mentioned a substantial number of tenants occupying space in the building has been regularly and continuously engaged there in the use of the mails, telephone, telegraph and other instrumentalities of interstate commerce to communicate between offices in the building and various points outside of the State of New York; in collecting, preparing and disseminating information and intelligence by use of the channels of interstate commerce; in arranging and in facilitating the movement of personnel and equipment across state lines.

XIV

At all times herein mentioned a substantial portion of the tenants in the building occupying a predominant portion of the space in the building has thus been regularly and continuously engaged there in trade, commerce, trans- [fol. 13] portation, transmission and communication between the several states of the United States and in the production of goods for distribution among the several states of the United States.

XV

Since October 24, 1938 defendants have employed a total of approximately sixty (60) and an average of approximately fifty (50) employees, including plaintiffs, as building maintenance and operating employees in such capacities as elevator starters, elevator operators, watchmen, engineers, firemen, porters, electricians, mechanics and handymen, in the maintenance and operation of the building and of the facilities within the building. These employees have at all times performed the customary duties of persons charged with effective maintenance and operation of such buildings, including the furnishing of heat and hot water, the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants; and other passengers; as well as raw materials and other goods coming to and finished goods and other products going from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stair-

ways and other common parts of the building; the keeping of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the buildings; and related clerical tasks.

XVI.

In performing their duties the said employees, including plaintiffs, have been engaged in operations closely, immediately and essentially related to interstate trade, commerce, transportation, transmission and communication [fol. 14] carried on in the building by the various tenants, and in occupations and processes necessary to the preparation, handling and production for interstate commerce of various goods, commodities, materials, supplies and equipment by the tenants in the building.

XVII

Between October 24, 1938 and the present defendants have employed plaintiffs and various other employees similarly situated in interstate commerce and the production of goods for interstate commerce, for workweeks longer than the applicable maximum number of weeks prevailing under Section 7 of the Act (44 hours per week between October 24, 1938 and October 24, 1939, 42 hours per week between October 24, 1939 and October 24, 1940, and 40 hours per week subsequent to October 24, 1940) and defendants failed and refused to compensate plaintiffs and such other employees for such employment in excess of the applicable maximum in such workweeks at rates not less than one and one-half times the regular rates at which they have been employed. The employment of the plaintiffs and other employees similarly situated for workweeks in excess of the applicable maximum prevailing under Section 7 of the Act without compensating them for such excess at rates not less than one and one-half times the regular rates at which they have been employed was in violation of Section 7 of the Act.

Wherefore plaintiffs pray that judgment be awarded in favor of each of them and in favor of each other employee similarly situated in an amount equal to the difference between the amount each employee has respectively received and the amount each employee should respectively

have received if he had been compensated in accordance with the requirements of Section 7 of the Act, together with an equal additional amount as liquidated damages, or [fol. 15] a total of approximately \$35,000; and plaintiffs further pray that the Court allow the costs of this action together with a reasonable attorney's fee to be paid by defendants in accordance with Section 16 (b) of the Act.

Victor J. Herwitz, Attorney for Plaintiff, 521 Fifth Avenue, New York, N. Y.

IN UNITED STATES DISTRICT COURT

ANSWER OF 10 EAST 40TH STREET BUILDING, INC.

The defendant 10 East 40th Street Building, Inc., by Proskauer, Rose, Goetz & Mendelsohn, its attorneys, in answer to the complaint herein:

1. Denies each and every allegation contained in paragraph numbered "IV" of the complaint, except admits that between October 24, 1938, and the present date, the defendant 10 East 40th Street Building, Inc. has been the owner of a forty-four story building located at 10 East 40th Street, in the Borough of Manhattan, City and State of New York, and that said defendant's business has consisted of the management and operation of the building and the rental of space in the building to various tenants.

2. Denies each and every allegation contained in paragraph numbered "V" of the complaint, except admits that during the times mentioned therein, Cross & Brown Company acted as the agent of and for the account of the defendant 10 East 40th Street Building, Inc., in the management and operation of the building, and in behalf of the [fol. 16] owner had authority to hire and discharge employees and to issue instructions to and supervise employees in the performance of their duties.

3. Denies each and every allegation contained in paragraphs numbered "VI" and "VII" of the complaint, except admits the allegations contained therein which are admitted in paragraph "8" of this answer.

4. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations

contained in paragraphs numbered "VIII", "IX", "X", "XI", "XII", "XIII" and "XIV" of the complaint, except admits the allegations contained therein which are admitted in paragraph "8" of this answer.

5. Denies each and every allegation contained in paragraph numbered "XV" of the complaint, except admits that the employees of the defendant 10 East 40th Street Building, Inc. have at all times performed such customary duties of persons charged with effective maintenance and operation of such buildings as the furnishing of heat and hot water, the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as stationery, furniture, and such other equipment as is usually found and used in offices, advertising copy, photographic materials, law books, papers and briefs, architects' papers and plans, dentists' equipment, and, with respect to tenants occupying not more than 19% of the premises, a few samples of merchandise elsewhere manufactured; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping [fol. 17] of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks.

6. Denies each and every allegation contained in paragraph numbered "XVI" of the complaint.

7. Denies each and every allegation contained in paragraph numbered "XVII" of the complaint, except admits that certain employees of the defendant 10 East 40th Street Building, Inc. worked in excess of forty-four (44) hours per week between October 24, 1938, and October 24, 1939; worked in excess of forty-two (42) hours per week between October 24, 1939, and October 24, 1940; and worked in excess of forty (40) hours per week subsequent to October 24, 1940; and that the defendant 10 East 40th Street Building, Inc. has not compensated said employees at rates not less than one and one-half times the regular rates at which they have been employed.

8. The defendant 10 East 40th Street Building, Inc. admits that it has leased space for executive and sales offices to twenty (20) concerns which carry on elsewhere the business of manufacture, occupying 27% of the space of the building; that it has leased space to forty-one (41) lawyers occupying 18% of the space of the building; that it has leased space to the United States Employment Service, occupying 14% of the space of the building; that it has leased space to seven (7) advertising and photographic studio companies, occupying 10% of the space of the building; that it has leased space to eight (8) architects and other companies, of which some receive, for approval, plans prepared outside the building, and others prepare plans, blueprints, etc., in the building, occupying 9% of the space of the building; that it has leased space to nine (9) private investment, financing and credit organizations, occupying [fol. 18] 6% of the space of the building; that it has leased space for executive offices to five (5) coal, tobacco, paper and pulp companies which carry on their business elsewhere, occupying 3% of the space of the building; that it has leased space for executive offices to four (4) import and export concerns, occupying one per cent of the space of the building; that it has leased space to five (5) dentists and textile research companies, occupying one per cent of the space of the building.

Wherefore, defendant, 10 East 40th Street Building, Inc., prays that plaintiffs' complaint herein be dismissed with costs.

Dated: New York, December 1, 1942.

Proskauer, Rose, Goetz & Mendelsohn, (Signed) Wilbert H. Friedman, A Member of the Firm, Attorneys for Defendant, 10 East 40th Street Building, Inc. Office & P. O. Address, 11 Broadway, Borough of Manhattan, City of New York.

ANSWER OF CROSS & BROWN COMPANY

The defendant, Cross & Brown Company, answering the complaint herein:

First.—Denies each and every allegation contained in paragraphs numbered “VI”, “VII”, “XVII”, and “XVI” of plaintiffs’ complaint.

Second.—Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered “VIII”, “IX”, “XII”, “XIII”, and “XIV” of plaintiffs’ complaint.

Third.—Admits so much of the allegations contained in paragraph “V” of plaintiffs’ complaint as allege that Cross & Brown Company acted as agent of and for the account of the defendant, 10 East 40th Street Building, Inc., during the times mentioned in the complaint in the management and operation of the building and in behalf of the owner had authority to hire and discharge employees and to issue instructions to and supervise employees in the performance of their duties and, except as so admitted, denies each and every other allegation contained in said paragraph.

Fourth.—Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered “X” of plaintiffs’ complaint insofar as they allege that substantial quantities of raw materials from which goods have been produced have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantial quantities of [fol. 20] such goods have been produced for interstate commerce and have been, subsequent to the work performed upon them in the building, sold, shipped, transported, distributed and delivered in interstate commerce to points in various states other than the State of New York, and denies each and every other allegation contained in said paragraph.

Fifth.—Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered “XI” of plaintiffs’

complaint insofar as they allege that substantial quantities of goods have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantial quantities of such goods have been sold, shipped, transported, distributed and delivered in and from the building to points in various states other than the State of New York, and denies each and every other allegation contained in said paragraph.

Sixth.—Admits so much of the allegations contained in paragraph numbered "XV" of plaintiffs' complaint as allege that the owners employees have at all times performed the customary duties of persons charged with effective maintenance and operation of such buildings, including the furnishing of heat and hot water, the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as raw materials and other goods coming to and finished goods and other products going from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping of the building and [fol. 21] tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks, and, except as so admitted, denies each and every other allegation contained in said paragraph.

For a First Complete Defense, Defendant Alleges:

Seventh.—That throughout the entire period of time covered by the complaint, plaintiffs were compensated for the number of hours worked and for the periods worked at rates agreed to between the defendant, 10 East 40th Street Building, Inc. and themselves.

Eighth.—That by this action plaintiffs claim that in addition to the wages paid them as aforesaid the defendant was and now is required to pay them one-half time for all hours worked each week in excess of the maximum stipulated in Section 7 (a) of the Fair Labor Standards Act of 1938 (hereinafter called the "Act") based upon an hourly

rate computed by dividing the regular weekly wage in each case by the hours worked each week; and plaintiff also claims there should be added to this sum, calculated as above set forth, a like sum as so-called "liquidated damages" under Section 16 (b) of the Act, together with a reasonable attorney's fee to be fixed by the Court.

Ninth.—That upon information and belief at no time prior to June 1, 1942, did plaintiffs ever make any claim for additional wages under the Act.

Tenth.—That at the end of each pay period during their employment by defendant, 10 East 40th Street Building, Inc., plaintiffs individually received wages for the period in question and signed a statement in full for all hours worked during such pay period.

[fol. 22]. Eleventh.—That by reason of the foregoing facts and circumstances, plaintiffs are and should be estopped from prosecuting the claims set forth in the complaint herein.

For a Second and Partial Defense, Defendant Alleges:

Twelfth.—Defendant here repeats all of the allegations contained in paragraphs numbered Seventh to Tenth inclusive hereof.

Thirteenth.—That plaintiffs' course of conduct as set forth in paragraphs numbered Seventh to Tenth inclusive hereof was calculated to increase the damages, interest and costs which might be recoverable by plaintiffs in an action such as the instant action, contrary to plaintiffs' legal obligation to mitigate damages; and that defendant was afforded no notice of plaintiffs' claim or opportunity to meet such claim at such times and under such circumstances as would have enabled defendant to avoid or minimize the damages now claimed by plaintiffs.

Fourteenth.—Wherefore, plaintiffs are and should be estopped from asserting any claim or claims for liquidated damages or an attorney's fee as set forth in the complaint herein.

For a Third and Partial Defense, Defendant Alleges:

Fifteenth.—If it is held that plaintiffs are entitled to recover liquidated damages and an attorney's fee under

Section 16 (b) of the Act, then such application of the Act or said Section thereof would be and is unconstitutional under the Fifth Amendment to the Constitution of the United States, in that it would deprive the defendant of its property without due process of law.

[fol. 23] Wherefore, defendant Cross & Brown Company prays that plaintiffs' complaint herein be dismissed with costs.

Harold J. Treanor, Attorney for Defendant, Cross & Brown Company, Office & P. O. Address 12 East 41st Street, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

STIPULATION RE SEVERANCE

It is Hereby Stipulated by and between the undersigned that the above entitled action as to the defendant Cross & Brown Company be and the same hereby is severed and to be marked off the ready calendar and placed upon the reserve calendar, whence it may be restored as hereinafter provided upon motion of the attorney for the plaintiffs or the attorney for Cross & Brown Company.

It is Understood and Agreed between the attorney for the plaintiffs and the attorney for Cross & Brown Company that in the event a final judgment is recovered by either the plaintiffs or by the defendant, 10 East 40th Street Building, Inc., and in the case of the former such judgment is satisfied, that the action against the defendant Cross & Brown Company will be marked settled and discontinued without costs as to either the plaintiffs or the defendant Cross & Brown Company against the other, and that the plaintiffs will execute general releases in favor of the defendant Cross & Brown Company.

[fol. 24] It is further understood and agreed by the undersigned that an order may be entered hereon without further notice to any of the parties hereto.

Dated: New York, N. Y., March 15, 1943.

Victor J. Herwitz, Attorney for Plaintiffs. Proskauer, Rose, Goetz & Mendelsohn, Attorneys for Defendant, 10 East 40th Street Building, Inc. Harold J. Treanor, Attorney for Defendant, Cross & Brown Company.

IN UNITED STATES DISTRICT COURT

Statement of Evidence

New York, March 16, 1943, 2 o'clock p. m.

Before Hon. Murray Hulbert, District Judge

APPEARANCES:

Victor J. Herwitz, Esq., Attorney for Plaintiffs; Victor J. Herwitz, Esq., J. L. Goldwater, Esq., and Monroe Goldwater, Esq., of Counsel.

Proskauer, Rose, Goetz & Mendelsohn, Esqs., Attorneys for Defendant, 10 East 40th Street Building, Inc.; Joseph M. Proskauer, Esq., and Harold Levin, Esq., of Counsel.

Harold J. Treanor, Esq., Attorney for Defendant, Cross & Brown Company.

[fol. 25] HORACE W. HARDY, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Mr. Hardy, what business are you in?

A. I happen to be the art director of the company.

Q. Have you stated the name of the company?

A. Forbes Lithograph Company.

Q. Where do you have your offices?

A. 10 East 40th Street, Room 2203.

Q. Who is in charge of that office?

A. Mr. C. F. Haist.

Q. Will you state, Mr. Hardy, what the business of the Forbes Lithograph Company is?

A. They produce and print lithographic material.

Q. Will you explain more fully the purpose for which lithographic material is printed and produced?

A. That is mainly for advertising purposes.

Q. Mr. Hardy, the purpose of this examination is to develop the business of the Forbes Lithograph Company in extenso.

A. The Forbes Lithograph Company is mainly concerned with lithograph printing, where lithographs are made up.

Q. Do they maintain a factory?

A. In Chelsea, Massachusetts.

Q. Is that the only factory they have?

A. That is the only factory we have.

Q. What is your job with the company?

A. I happen to be art director of the company, as I previously stated.

Q. How long have you been, you personally, at 10 East 40th Street?

A. I believe about five years—am I correct, Mr. Osborn?

Mr. Osborn: Four years at 2203.

The Court: How many people are there employed in the office at 10 East 40th Street?

The Witness: In my office, five.

[fol. 26] The Court: How many in the whole office?

The Witness (To Mr. Osborn): How many are upstairs?

Mr. Osborn: Eight salesmen, three stenographers and three artists.

Mr. Proskauer: I consent that that answer be adopted by the witness.

By the Court:

Q. That is 19 people altogether?

A. May I explain one thing? There are two offices in that building. I happen to be connected with the Philadelphia Division and Mr. Osborn represents the New York office.

By Mr. Herwitz:

Q. Under whose supervision do you work?

A. Under the company's supervision.

By the Court:

Q. Let me interrupt. You mean there is other space in the building besides Room 2203?

A. Yes, 2203 and 3003. For the purpose of clarification, Room 3003 is the New York office and I am in the so-called Philadelphia Division.

Q. They are on different floors?

A. Yes.

Q. There are 14 persons employed in one office and 5 in the other, is that right?

A. Yes.

By Mr. Herwitz:

Q. Will you state how long you have been connected with the company?

A. Since 1932.

Q. Do you know how many other offices the company has?

A. Do you wish me to enumerate them?

Q. Yes.

A. Rochester, Cleveland, Chicago—they are sales offices.

[fol. 27] Q. Do they have any other offices of any kind, character or description that you know of?

A. Not that I know of.

Mr. Proskauer: He has not mentioned the Chelsea office.

The Witness: That is the home office where the work of manufacturing is done. That is the home plant, sir.

Q. You say you are connected with the Philadelphia Division?

A. Yes.

Q. Is there any office in Philadelphia?

A. No, sir, that was closed.

Q. When was that closed?

A. When I came downstairs, four or five years ago.

Q. Is there an office maintained in Philadelphia?

A. Yes.

Q. Does that mean that you confine your activities to the Philadelphia business here in New York?

A. Not completely. I am at the service of the company wherever required.

Q. Will you explain what your relationship with the Philadelphia office is?

A. I am creator of the art work—director of the art work.

Q. Do you have other artists under your supervision?

A. I have.

Q. How many?

A. Directly employed by the company?

Q. Yes.

A. Is that what you are talking about?

Q. Yes.

A. I would say seven or eight are on the payroll in Boston and I think only two in New York.

Q. Do you, in addition to those seven or eight — Boston and two in New York have other artists working under you from time to time?

A. Just as many other artists as I require. The world is open to all of them, whatever artists are available to take a job.

Q. I assume from that that your answer is yes?

A. Yes.

[fol. 28] Q. Do you have certain other regular artists that work for you from time to time?

A. Well, I can answer that by saying that I am free to pick from whatever place I can secure an artist. I use free-lance artists in the Philadelphia Division—I mean artists for such work as I require.

Q. You mean there are no regular artists working for the company, is that what you mean, who do work in connection with the Philadelphia Division, is that correct?

A. That is correct.

Q. You say you are the art director for the company itself?

A. I am.

Q. In addition to doing whatever you have to do in connection with the Philadelphia Division?

A. That is a so-called title, if you want to put it that way.

Q. Mr. Hardy, we are trying to get the picture of your organization. Don't consider that you have to wait for me to draw it out piece by piece. If you will explain to the Court the operation of that business and your connection with it, that would be helpful.

A. That is very simple. My job is one of creative work.

By the Court:

Q. Your work as an art director is concerned with illustrations that you get out?

A. Let me explain it this way: If one of our clients wants a piece of advertising, I am generally called in for consultation and from there on develop it, by determining what copy writers I need; what artists I might need for doing that particular piece of art work and that, I think, is very briefly, a summary of what I do.

Q. Do you make a distinction between regularly employed persons whom you call upon and free-lance persons that you call upon?

A. No, sir, they are all known as free-lance artists that I employ.

Q. You mentioned the fact that there are five people employed in this office which you occupy at 10 East 40th Street. [fol. 29] Are those people free-lance artists or regularly employed?

A. There is my associate, two secretaries and a boy.

Q. You do not classify those persons as artists, do you?

A. No, I don't.

Q. So the artists that you employ to carry out whatever ideas you conceive, are the free-lance artists?

A. Yes, sir.

By Mr. Herwitz:

Q. Are you an artist, Mr. Hardy?

A. I am—I assume I am.

Q. Is Mr. Haist who is connected with you an artist?

A. No, he is sales manager and director of the company.

Q. Do you do any actual art work in your premises at 10 East 40th Street?

A. Personally?

Q. Yes.

A. Well, I would make thumbnail sketches or drafts, which I could do in about 30 seconds on a scratch pad, and tell the artist from that what to do. You asked whether I am an artist, that is the way I work.

Q. In other words, you call in free-lance artists or an artist connected with the company, and you give him an illustration in outline of what you want him to make up, is that it?

A. No, I don't.

By the Court:

Q. You give him a conception of what you want?

A. I don't use any company artist in my personal work.

By Mr. Herwitz:

Q. You only employ free-lance artists?

A. Yes.

By the Court:

Q. You get an idea from someone who wants to advertise and you give what is your conception of the idea?

A. Yes.

[fol. 30] Q. And you discuss that with the person who is to make that up?

A. Yes.

Q. Then you turn it over to the free-lance artist to carry that out?

A. Yes.

Q. And then it comes to you for approval?

A. That's it. This is not one of my personal creations. Most of this class of work comes to us, say if someone wants an idea, we will say for a Christmas poster—

The Court: You needn't go into that.

Mr. Herwitz: Would you mind, your Honor, if I pursue that a little bit?

The Court: Yes, go ahead.

By Mr. Herwitz:

Q. All right, will you proceed.

A. That is as far as I go. That tells the whole story.

Q. You say if someone wants an idea for a Christmas poster.

A. Yes.

Q. Will you tell us who that somebody would be?

A. A customer or his representative.

Q. The Forbes Lithograph Company is an advertising company, isn't it?

A. It is a print lithographic company. It is not known as an advertising company in the way that expression is used.

Q. Not only do you sell advertising, but you print the material?

A. We print the material. We don't sell it. That is bought by the customer.

The Court: They don't do the advertising. They produce the product which the advertiser uses, is that it?

The Witness: Yes.

Q. But, Mr. Hardy, you assist the customer, do you not, in preparing the artistry and the legend that goes with the artistry?

A. Absolutely.

[fol. 31] Q. And your function in the company is to assist the customer in connection with making the illustrations?

A. That is right.

The Court: Somebody pitches the ball and Di-Maggio bats it.

Q. The Forbes Lithograph Company has salesmen?

A. That is right.

Q. Are they salesmen working out of the office of 10 East 40th Street?

A. We have salesmen working at Room 2203, 10 East 40th Street.

Q. That is your office?

A. Yes.

The Court: And others work out of 3003?

The Witness: Yes.

Q. Do these salesmen go to various customers in the area in order to tell them something?

The Court: What do you mean by "the area?"

Q. Will you tell us what the area is?

A. It might be anywhere outside of New York. Mr. Haist's territory does not include New York; Mr. Osborn's territory does not include New York.

Q. You confine your activities to out-of-State activities?

A. I would say so, as far as the customer's location goes.

Q. Are there salesmen connected with the company who visit customers out of New York State?

A. I would say so.

Q. Do these salesmen who go to these customers, go with the view to selling them an advertising campaign?

A. No.

Q. Will you explain to the Court what these salesmen do?

A. Well, as an illustration, take the Coca-Cola Company, for which I happen to be doing some work and with which company I am acquainted, and they come to me and require a piece of material for a fountain festoon. They say they [fol. 32] want that particular material, something to be put over the fountain top. They don't tell me exactly what they want. That is up to me to create a piece of art work that will carry the message for them in an appropriate way over the top of the fountain. I come to New York and procure the material which they require and submit it to them.

Q. Take the Coca-Cola, is that a regular account of the Forbes Lithograph Company?

A. I would say so.

Q. That is so, is it not?

A. Yes.

Q. Do salesmen visit the Coca-Cola Company?

A. One salesman visits the Coca-Cola Company.

Q. Where is the headquarters of the Coca-Cola Company?

A. Atlanta, Georgia.

Q. And that is where the salesman connected with the company visits?

A. Yes.

Q. Does he work from 10 East 40th Street?

A. He does.

Q. He visits the Coca-Cola Company in Atlanta, Georgia?

A. Yes.

Q. Does he sell them anything?

A. I would not say he sells them anything, the way I use word or define selling.

Q. Tell us what he does.

By the Court:

Q. He develops an idea, is that it?

A. He develops an idea. He is the one that carries the message to Garcia, as it were. He comes back and if I happen to be here, I have a conversation with him and I develop the idea. He is the salesman who makes the contact.

By Mr. Herwitz:

Q. Is it correct to say that he creates the desire of the Coca-Cola Company to embark on a certain advertising campaign?

A. Not at all. That is an advertising agency function and we are not an advertising agency.

[fol. 33] Q. Don't you do more than just print the advertising?

A. No, we do not.

Q. Doesn't your organization aid in the preparation of both the artistry and everything on the advertisement which is ultimately printed as well as the language descriptive of the product?

A. In some cases yes, in some cases no. For instance, in the case of the festoon, we might just use the trademark of the company or we might say "Visit Our Fountain"; that

is the usual phrase, you might say, that is connected with the Coca-Cola advertising. That is not a creation of ours.

By the Court:

Q. Let me develop this thought. You started out with, as I understand it, this man from your office at 10 East 40th Street who, you say, went down to Atlanta, Georgia. He saw someone down there connected with the Coca-Cola Company?

A. Yes, the advertising department.

Q. After discussion with them, he came back and reported to you that the Coca-Cola Company wanted some sort of advertisement that would attract the attention of people with a thirst?

A. That is right.

Q. To a fountain in the drugstore or other place for the dispensation of drinks and which would call their attention to Coca-Cola?

A. That is correct.

Q. Thereupon you would make a rough drawing and that was turned over to one or more free-lance artists and developed, and when the form had been agreed upon, it was transmitted to your place, and then a particular placard was printed up?

A. That is correct.

Q. In whatever quantity the Coca-Cola arranged?

A. That is correct.

Q. To whom were these placards delivered for distribution?

A. To the Coca-Cola Company—the Coca-Cola Bottling [fol. 34] Company mainly and to various service stations maintained by the Coca-Cola Company.

Q. In other words, your organization conceived and developed that?

A. That is right.

Q. What was to be the advertisement, and then when it was made up in your factory, it was turned over to the customer for such distribution as that customer might choose to make either itself or through its agency which it employed?

A. That is correct.

Q. Do you know where the product manufactured at Chelsea, Massachusetts, would be delivered for the Coca-Cola Company?

A. I am not familiar with those details. That is the salesman's job.

Q. Do you know generally?

A. No, I don't.

Q. Was delivery made at or from 10 East 40th Street, New York?

A. No, sir, it was made in Chelsea.

By Mr. Herwitz:

Q. How many rooms are there in your office?

A. I would say there are four rooms.

By the Court:

Q. That is in Room 2203?

A. That is correct.

Q. How many in the suite 3003?

Mr. Proskauer: Is your Honor interested in the area?

The Court: No, not yet.

By Mr. Herwitz:

Q. Speaking of the four rooms on the 22nd floor, what are each of these rooms, what is done in each of them?

A. One is my office. The other two are salesmen's offices, and the other is merely a storage and wrapping room with [fol. 35] an easel there that I can use if necessary in order to develop a rough sketch of some kind.

Q. The fourth room is one with the easel in it?

A. It is a display room, storage, and so forth.

Q. Do you have any materials for painting pictures?

A. I haven't, no.

Q. Are there any in that office?

A. I will retract that. We have drawing paper, naturally.

Q. Do you draw on that paper?

A. As I said, I make some rough thumbnail sketches, yes. I have to do that to clarify my thought to the artist.

Q. How many rough sketches do you make?

A. Oh, I could not answer that.

Q. Is it plenty?

A. Well, some things you just put on a scratch pad. Sometimes I make them a little larger and sometimes we are just busy the whole day thinking out things.

Q. When you call in an artist to confer with, does he do any of his work in your premises?

A. No, sir, he does not.

Q. When he has finished his work, does he come and show it to you?

A. Naturally.

Q. Is there any retouching done?

A. There might be.

Q. Is that done on the premises?

A. Sometimes—sometimes not, depends on the time situation. If I wanted the letter L changed, for instance, it would take two seconds to do that. I certainly would not chase a man to 46th Street to do that.

Q. Sometimes it is changed at the premises?

A. I would say so.

Q. Will you name to the Court other accounts in addition to Coca-Cola that are handled by the Forbes L. Monograph Company from the office on the 22nd floor?

A. That is something that Mr. Haist can answer. That is not my job.

Q. Mr. Haist isn't here, so I am asking you what you know about that.

A. I think that is company business and I don't think the [fol. 36] company would want to know who their accounts are, unless the Court insists that I should tell.

The Court: You are only asked to tell what you know.

The Witness: Shall I tell what I know? My job is confidential. I stated about the Coca-Cola because that is something we all know. We know where we stand with Coca-Cola.

The Court: I hold that that is not confidential so far as the Court is concerned.

The Witness: All right, we do a little work for du Pont, Hercules Powder, Saturday Evening Post Publishing Company; we have printed some material for the American Oil and Gulf Refining Company. We do not do any creative work, however, for the latter two accounts.

Q. Do you know approximately the volume of business done from your premises at 2204 or 2203 at 10 East 40th Street?

A. I have no idea whatsoever because that part of the business does not come within my jurisdiction at all.

Q. How many different accounts would you say you serviced at those premises?

A. Those particular ones I just mentioned.

Q. In the course of a year?

A. That is right.

Q. How many different layouts or displays did you prepare or are prepared under your jurisdiction or supervision?

Mr. Proskauer: I would like to have that question separated, if your Honor please.

The Court: Yes, I think the question is rather indefinite.

Q. All these accounts that you have mentioned maintain offices outside of New York State, is that correct?

A. I would say so, yes. Some of them have offices in New York.

[fol. 37] The Court: I was just going to say if any of them maintain offices in New York.

The Witness: Practically every one that I mentioned has offices in New York.

Q. Do you do any traveling, Mr. Hardy?

A. I do.

Q. Where do you travel?

A. Atlanta, Georgia.

Q. Is that frequently?

A. Three, four, five or six times a year, depending on what the nature of the business might be.

Q. Do you speak on the telephone to the Coca-Cola people?

A. I certainly do.

The Court: In Atlanta do you mean?

Q. In Atlanta, Georgia.

A. I do.

Q. How frequently do you do that?

A. That would be almost impossible to say, whether it is once a week or twice a week or once a month, depending on the nature of the message that is to be carried forward.

Q. Do you communicate with them by telegraph or by letter?

A. I communicate with them by any means that will expedite the carrying of the message that is necessary. That will cover that question more nearly.

Q. Does that include mail or telegraph?

A. That would include any form of communication.

Q. After a creation is approved by the account, is it then sent to the factory in Chelsea, Massachusetts?

A. It is.

Q. Are the proofs returned?

A. In some cases yes, and in some cases I have to pass on those proofs myself for the client. Sometimes it goes to the customer for approval, which is generally the case.

Q. In some cases is the proof sent to your office?

A. I always ask for proofs to come to my office?

Q. And do you correct those proofs?

A. Do you mean do I correct them personally? I mark them for correction.

Q. Do you mark them for correction yourself?

A. I do.

[fol. 38] Q. After you do that, then what do you do with the proof?

A. Send it back to the plant for correction along with any criticisms that the customer may make.

Q. Do I understand this Coca-Cola item is sent to Atlanta, Georgia?

A. Absolutely.

Q. Do you send it to Atlanta, Georgia, or is it sent from Chelsea, Massachusetts?

A. It depends on the matter of discussing the proofs, sometimes yes, sometimes no.

Q. Do I understand that in some instances the proof is sent to you?

A. In most cases the proof is sent to me. I demand to see proofs of anything I create.

Q. Do you ever make any creations and send it to the Coca-Cola Company to make any corrections on?

A. Sometimes it is sent to the Coca-Cola Company to the plant for them to make corrections there.

Q. And in some instances it is not done?

A. Yes.

Q. When you send it, you send it from 10 East 40th Street to the Coca-Cola Company in Atlanta, Georgia?

A. That is right.

Q. When you speak of the Coca-Cola account, that would apply to the other accounts that you mentioned as well?

A. That would.

Q. Have you described the type of products produced by the Forbes Lithograph Company?

A. I just told you, printed photographic material.

Q. For what purpose is it used?

A. Generally advertising material. That is what it is known as. That is my conception of what the term advertising covers, everything we do, whether it is booklet, poster, large poster or small poster, that is for advertising.

Q. Do you make wrappers?

A. What do you mean by wrappers?

Q. Wrappers that are used in your business, will you tell me a little bit about that?

A. Personally in our office we haven't got any wrappers.

Q. Do you know whether the Forbes Lithograph Company makes any wrappers?

A. I wouldn't know.

[fol. 39] Q. Do you design wrappers?

A. I know they make boxes, if that is what you mean.

Q. You did not say anything about that.

A. There is a difference in the meaning of the word "wrappers" and "containers." Wrappers are something that are wrapped around, or called sleeves, something like that.

By the Court:

Q. When you send proofs from 10 East 40th Street to Chelsea, do you put them in envelopes or do you put them in wrapping paper?

A. It depends entirely on the size of the material. Sometimes it is expressed or sent by express and it would come to my office that way; sometimes it comes by railway express or by mail, whichever is the quickest way.

Q. Would you put it in boxes?

A. We put them in large manilla wrappers or crate them, depending on the size of the unit that is involved.

Q. When the product is finished at Chelsea, it is shipped out from Chelsea?

A. It is shipped from Chelsea, yes.

Q. And whatever container is used depends on the character of the package, whatever you think is most desirable?

A. That is correct.

By Mr. Herwitz:

Q. There is this carrier that is used by the Coca-Cola people, do you know what I mean by that, Mr. Hardy?

A. Carrier?

Q. Yes, something that you put the bottles in.

The Court: He means these six-bottle containers.

Q. Yes, is that made by the Forbes Lithograph Company?

A. No, that is not. I will say one thing, we do have the pleasure of making a Christmas package for the New York trade.

[fol. 40] Q. When that was made in Chelsea, Massachusetts, did Christmas item that you refer to, is that shipped from Chelsea, Massachusetts, into New York?

A. That would depend entirely where the Coca-Cola Bottling Company wanted to send it. I have no knowledge of that. I don't know enough about that particular phase of the work.

Q. Was any of that sent to your office in New York?

A. Just for a sample like anything else, for criticism.

Q. Can you give us any estimate—an approximate estimate of the volume of the business or the value of the business that you have?

A. You asked that question before, and had no answer for it because I don't know.

Q. Well, would you say that it exceeded any particular sum?

A. I have no way of knowing. Those figures are never brought to our attention, because I have nothing to do with it. That is the sales department's job.

Q. Do you have any knowledge of the number of pieces made?

A. Yes, I would know if it would be 25,000, 50,000 or 2,000.

The Court: Do you make prices?

The Witness: No, sir, I do not.

Q. In the course of a year, do you know how many pieces were made by the Forbes Lithograph Company for the Coca-Cola people?

A. I wouldn't know.

Q. Would it be more than a hundred thousand?

A. I would say so, yes.

Q. Would it be more than a million?

A. That I could not say. When you say pieces of material, I would not have any way of knowing.

Q. Would it be more than a million for all the companies that you have mentioned that you have to do with?

A. You mean a million pieces?

Q. A million pieces, yes.

A. What do you mean by a piece, something that the [fol. 41] Judge asked about that could be wrapped up in a package? There might be 500 pieces in one package.

Q. Yes, I do mean that.

A. I would not have any way of knowing how many pieces are made or shipped out.

The Court: By "pieces" I take it you mean the final product, whatever it is?

Mr. Herwitz: That is correct.

The Witness: I wouldn't know. If you asked me to guess, I would say yes.

Q. What is your best guess?

A. I wouldn't know.

The Court: That wouldn't help me any.

Q. Would you venture to say it was more than a million?

A. I think it is a question I should not be required to answer under those conditions because I don't know. I really have no way of knowing. That is the salesman's job.

Q. You do know, as you said before, that you did know how many pieces of a particular item the Coca-Cola people would want.

A. I do, but I don't know what the total would be in the course of a year.

Q. Can you give us any estimate of the number of separate items of creation that you have worked on in the past two years, let us say?

A. I wouldn't know.

Q. Do you have a record of that?

A. Of the items? That would be covered by the sales office. When you say "items" I really don't know how many items.

Q. Can you give us how many in the last month, Mr. Hardy?

A. What date is today?

The Court: This is the 18th.

A. (Continued:) I would say six in the last month.

Q. Was the last month a normal month?

A. Do you mean the produced or what I worked on?

[fol. 42] Q. What you worked on.

A. I would say six.

Q. Is that normal?

A. No, I would not say that, because the first half of the month is covered by the beginning of the operation and that necessitates quite a little sketch work. Otherwise I might not have to do so much.

Q. You say quite a little sketch work; what do you mean by that?

A. I mean in other words, development of an idea.

Q. How many sketches have you made in the last month?

A. You mean personally?

Q. Personally.

A. About one—on a little thumbnail sketch.

Q. You only made one on a thumbnail in the last month?

A. Yes.

Q. What do you mean by a "thumbnail" sketch?

A. When talking with the artist, you take a sketch pad and talk to him about the objective of this job—in other words, it is thinking out loud. I don't exactly make sketches; I just talk with a pencil like you talk with your tongue.

Q. Did you only do that once?

A. You asked how many sketches I personally made and I said one. How many times did I say, six or seven in a month?

Q. Yes.

A. Each one of those required—shall I say conversations for discussion.

Q. At the premises at 10 East 40th Street?

A. Not in all cases. Sometimes I visit the artist, or he comes to my office. Usually the procedure is at the office.

Q. When these artists come to visit you, and you have an exchange of ideas, then you make sketches?

A. I just talk with a pencil. You would not call it a sketch, because you wouldn't understand it. I mean no one else can but the artist, because it might just be a block or face or something.

Q. I don't want to pass judgment on that. Does the free-lance who comes to you to visit, does he talk with a pencil also?

A. No; not in my office, he goes to the studio to work.

[fol. 43] Q. Does he do it at all?

A. In the beginning?

Q. Yes.

A. I would say no.

Q. Do you have paint brushes in your office?

A. Yes.

Q. And do you use them?

A. Probably once or twice a year I might do a little touching up or varnishing, because if it has laid around for a time, and it needs varnishing, I varnish it; that is part of my job.

Q. Are those brushes there for that purpose?

A. I would say so.

Q. You say you have an easel there?

A. Well, you might call it a drawing board.

Q. Didn't you call it an easel?

A. It is a drawing board; sometimes it is called an easel.

Q. Do you make drawings on there?

A. If it needs correction, I would have to do that, naturally.

Q. Is this done in connection with items or creations which are ordinarily manufactured at the Forbes Lithographing Company in Chelsea, Mass.?

A. That is right.

Q. These display pieces include not only pictures but also printed matter, do they not?

A. Yes; for instance, a booklet is printed matter. Some of the things I talked about are pictorial with no wording on it at all.

Q. But there are some items which are made up which do have printing matter on?

A. That is right.

Q. Who is the creator of the printing matter?

A. You mean the wording?

Q. Yes.

A. In some cases—I would say in most cases the customer, and in some cases we help.

Q. In some cases, as I understood from a question the Judge put to you a little while ago, the customer will give you the general idea and ask you to create something, is that right?

A. That is correct.

Q. That would include the printed matter too?

A. At his suggestion, yes.

Q. In some instances?

A. Yes.

Q. In those instances where the print matter on this poster is made up by you rather than the customer—when [fol. 44] I say “you” I mean the Forbes Lithograph Company—who in the Forbes Lithograph Company has anything to do with that?

A. I would say I myself might. It might even come from the office boy or one of the employees in Boston. We have a research plant in Boston—

Q. Do I understand you do some of this creative work as far as the printed matter is concerned?

A. My limit would be in reorganizing a headline, or something like that. I am not a copy writer.

Q. But you do have something to do with that?

A. If you should say that the thing was too long, I would probably work on it.

By the Court:

Q. Do you employ copy writers?

A. If necessary, yes.

By Mr. Herwitz:

Q. Do you personally do that?

A. Do you mean employ copy writers?

Q. Yes.

A. The company does it.

Q. Don't you hire them?

A. I would say the company hires all employees. I might ask someone to represent me, just as I pick an artist—

By the Court:

Q. You mean an outside man?

A. That is right.

By Mr. Herwitz:

Q. In other words, on behalf of the company, you would employ the copy writer as well as the artist?

A. I would have to. If you want to have some writing done, you have to have someone to write it.

Q. And does that copy writer come to your office to consult concerning that printed matter?

A. Naturally.

[fol. 45] Q. Are there any regular copy writers on the staff of Forbes Lithograph Company?

A. We haven't a copy writer on the staff. We are not an advertising agency.

Q. Do you have your customers hire the copy writer?

A. If necessary, yes.

Q. Is the copy writer paid by the Forbes Lithograph Company or does the customer pay for that?

A. I believe he is paid by the Forbes Lithograph Company.

Q. Does the Forbes Lithograph Company when it bills the customer break down the item for the copy writer?

A. I wouldn't know.

Q. Is some of this creative work in connection with the printed matter that appears on items manufactured by the Forbes Lithograph Company created actually at the office, room 2003, 10 East 40th Street?

A. You mean are the ideas created there?

Q. Yes.

A. I wouldn't say that I created them myself. They are the culmination of two or three men working together.

Q. Do you sometimes have a copy writer in your office for a conference in connection with some printed matter to go out?

A. I just said yes.

Q. Do you sometimes in connection with a sketch, with the help of a copy writer make up the wording which will subsequently appear thereon?

A. Do I take it up with him after he makes it?

Q. In conference with you.

A. Possibly.

Q. On frequent occasions?

A. I would not say on frequent occasions, because we don't have much occasion to write much copy as far as my part of it is concerned.

Q. Does Mr. Haist do that?

A. I don't think so. He would not be classed as a copy writer either. He is a salesman.

Q. Are the layout instructions, size of the type and all the items and details concerning the piece which is ultimately to be manufactured given by you?

A. I would say so.

[fol. 46] Q. And do you prepare those instructions at 10 East 40th Street?

A. I do.

Q. Would you explain briefly, Mr. Hardy, what happens to a painting when it is sent up or a photograph when it is sent up to the Chelsea, Mass., office.

A. I would look at it and see if it needs varnishing; and if it would, I would spread some varnish over it, wrap it in a package and sent it to Boston.

Q. Will you explain what is done with the picture when it gets to Boston?

A. It is photographed, plates are made and it is printed. That is the normal procedure of reproducing a picture. That tells you the whole story.

Q. What is that?

A. That is the book gotten out by the Forbes Company and that will answer all your questions.

Mr. Herwitz: I would like to have it marked for identification, if your Honor please.

(Marked Plaintiffs' Exhibit 3 for Identification.)

Q. One last question, Mr. Hardy. The piece which is ultimately produced by the Forbes Lithograph Company is a reproduction of the identical painting which has been made up under your supervision and direction as you have heretofore described?

A. As near as can physically be done,—as long as the customer thinks so.

JOHN B. OSBORN, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Have you stated your business, Mr. Osborn?

A. I am with the Forbes Lithograph Company.

By the Court:

Q. In what capacity?

A. Vice-president and director, in charge of the New [fol. 47] York office and in charge of their sales office. I am general manager in charge of the Transparent Cellulose Division.

By Mr. Herwitz:

Q. How long have you been connected with the company?

A. Ten years.

Q. How long have you been located at 10 East 40th Street?

A. Well, with the exception of two years I have been in New York eight years, not consecutively.

Q. Do you have anything to do with the work of Mr. Hardy, the previous witness?

A. No, other than consultation work, you might say, in connection with art work and things like that.

Q. Then you do have something to do with him?

A. Yes; we are in the same building and we work on the same matters.

Q. You said you are vice-president in charge of the New York office?

A. Vice-president in charge of the New York office—the 30th floor.

Q. You have different jurisdiction than Mr. Hardy, is that correct?

A. Yes.

Q. And Mr. Haist?

A. That is right.

Q. Is Mr. Haist vice-president?

A. He is a director. I don't think he is a vice-president.

Q. I don't want to go into the relative positions of peo-

ple. Will you as fully and completely as possible in your own words, so that we may understand, describe the business of the Forbes Lithograph Company generally and the business of that company, conducted under your supervision at 10 East 40th Street?

A. Well, I will try to make this pretty short and give you the points.

Q. May I say this, Mr. Osborn perhaps the Court will want it to be short, but—

The Court: Don't make it short to the extent of leaving out any essential details.

[fol. 48] Q. Sufficient to give the full picture so that we will understand exactly what goes on. Don't try to make it too brief.

A. Generally speaking, the Forbes Company has two divisions, one which they term their lithograph division and the other which they term their rotogravure division. The lithograph division may be broken down into three different types or parts. There is the offset, direct and the letterpress. Then there is a division which is known as the rotogravure division. In the New York office we have eight salesmen, three artists and two stenographers and a telephone operator. It is our duty to solicit business for the factory for the home office, which is in Boston. We solicit that business by any means that are available to us. That is, by letters, telephone, direct contact.

The efforts of the 30th floor are confined pretty much to the New York area. That would include, of course, parts of New Jersey, the lower part of Connecticut, Brooklyn and Long Island. Mine, however, are confined to the Island of Manhattan itself. We solicit business by means of trying to impress upon the customer the quality of our work and the service we can render. We show samples. When we procure an order, that order is not accepted until it is received in Boston. In other words, we operate as the selling agent for the Forbes Lithograph Company. That is what it amounts to.

In the lithograph division there are two types of business, one which we term creative and the other non-creative.

The creative, as Mr. Hardy has already told you, is where an idea is perhaps given to us by a customer and expanded by our own art men. There may be other lithographers working on that same proposition. Our pres-

entation is made and the customer makes his selection. If the order is placed with the person who obtained it and that order is placed with us, the art work is sent to Boston where it is reproduced and it is shipped from Boston to the customer's factory or the customer's office where he so designates. There is no material actually handled in New [fol. 49] York that pertains directly to the manufacture. In the printing business the copy art work is all part of the order and sometimes an order may contain a painting of almost that size (indicating), whereas it may be only a little bit of a thing which may be clipped to the back of the order. That is a copy of your order, and that is what we are told to follow.

The other division, which is the rotogravure division, and in that department we print wrapping material, such as package wrappers, gum wrappers, tobacco wrappers—anything that be handled by automatic machine wrapping. That is all handled in Boston. Nothing is handled in New York with the exception of the actual sales.

Q. When you say "Boston" you mean Boston and Chelsea?

A. I am sorry, that is a misnomer; it is really Chelsea, Massachusetts.

Mr. Proskauer: Chelsea is a suburb of Boston, isn't it?

The Witness: That is a suburb of Boston.

Mr. Proskauer: And when you say "Boston" you mean Chelsea?

The Witness: That is right.

Mr. Herwitz: I think that was very helpful, thank you.

Q. Now, I will try to get some of the details, Mr. Osborn. You said in the lithographing business, all printing business, art work and creative work are all part of the selling, is that your language?

A. That is how we consider it, yes.

Q. Do I understand from that—that before a sale is made the art work has to be done?

A. No, no. Sometimes we get an order before the idea is even conceived.

Q. But before the ultimate conception is sent to Chelsea, Mass., for production and manufacture, it has to have the approval of the customer, is that correct?

A. Yes.

Q. So you may get an order but it is not final until that [fol. 50] step is taken, and sometimes, it is not correct to say, that the order is not received until the art work and display, in sample form, is shown to the customer, is that correct?

A. The reason I hesitate on that is there is a fine distinction there. The creative business is not sold that way. I would say yes, but a man would give us an order because we are a quality printer and we can service the account the way he likes it.

The Court: Are you sure you understood that question?

The Witness: Perhaps I did not.

The Court: Let the reporter read it.

Q. (Read.)

A. That is right.

Q. These samples that are shown to the customer either before the order or after the order, by whom are they prepared?

A. Those are samples which are sent to us from our Chelsea factory. They are actual samples of the jobs which go into his work, just like that book you have. That is what we term a sample.

Q. That would be a general sample which would not necessarily apply to the particular customer, is that so?

A. That is right.

Q. You have to make up a more exact article which the customer will be able to determine whether he does or does not want it?

A. That would not be termed a sample, that would be termed a sketch.

Q. Where are those sketches made?

A. They are made in New York by the Forbes Company or perhaps by the customer who gives us the sketch to quote on, in other words, to figure prices from.

Q. You say you have three artists?

A. That is right.

Q. What do they do?

A. They do art work.

Q. What kind of art work?

A. They make lettering—they do lettering, design pictures, design ideas—window displays, and things of that sort.

[fol. 51] Q. Do they make the pictures and lettering which ultimately will be sent to Chelsea, Mass., for reproduction?

A. That is right.

Q. That is made at the premises 10 East 40th Street?

A. That is right.

Q. By these three artists?

A. Yes.

Q. Pursuant to orders received from the customer?

A. That is right.

Q. Are those items prepared by those artists reproduced in Chelsea, Mass., and then sent from Massachusetts to the customer in New York, Connecticut, New Jersey, or wherever he may be?

A. That is right.

Q. What is the total volume—approximate volume of the business done at the New York office under your supervision and direction in the course of a year?

A. Are you talking about the lithograph division or the gravure section—everything that is under my supervision?

Q. Yes.

A. Pretty close to two million dollars.

Q. A year?

A. Yes.

Q. Do you know, as a director and vice-president of the Forbes Lithograph Company, what the volume of business is that is done on the 22nd floor?

A. I haven't those records and I don't know.

Mr. Proskauer: His figure included both floors, did they not?

The Witness: Oh, no. I would like to clarify that last statement that I made. I told you that I was responsible for the sales on the gravure department. I neglected that whole department in that figure. You asked me for what I was responsible for, didn't you?

Q. Yes. Is there more volume from the New York office than you have stated?

A. That covers everything.

Q. Just what you have testified, that covers everything?

A. It is split fifty-fifty, the New York office accounts for

[fol. 52] about half of that; the rest, which is the gravure department, accounts for the other half.

By the Court:

Q. Would the business that has been referred to as the Philadelphia office or the Philadelphia business be exclusive of the figure you have given?

A. That is exclusive of that.

By Mr. Herwitz:

Q. Would you have any idea approximately of the number of pieces produced as a result of the activities under your supervision and direction of these two departments, the lithograph and the rotogravure department?

A. I couldn't come within a mile of that.

Q. Are they reckoned by the million?

A. For example, we make gum wrappers and we sell thousands of pounds of gum wrappers, and there are probably 1,200 gum wrappers to a pound.

The Court: This doesn't mean anything to me at all. I don't know what the size of those things are, and I would not know what the answer means.

Mr. Herwitz: I withdraw the question.

The Court: A man might make a million mousetraps or might make 15 traps to catch all of them; there might be more in the latter than the former. You must have some identification or character of the thing.

Q. Would you have any idea of the number of normal-sized wrappers—gum wrappers—

The Court: Just a moment. What is the normal size of a gum wrapper?

Mr. Herwitz: Can you take judicial notice of that, your Honor?

[fol. 53] The Court: No. I don't even know what a normal pair of shoes are.

Q. What is the average size of a gum wrapper, Mr. Osborn, that is manufactured by the Forbes Lithograph Company?

A. 3.10 by 3¾ inches.

Q. Do you know the number of such gum wrappers manufactured by the Forbes Lithograph Company as the result

of your activities in the New York office in the course of a year?

A. Just the New York office?

Q. Yes.

A. No, I could not give you that. I could guess at the number of pounds. The yield varies with every single job. The yield varies with the coverage of ink on the job.

Q. Suppose you give us the number of pounds?

A. Just on gum wrappers?

Q. Yes.

A. About 250,000 pounds.

Q. What other type of items do you manufacture at the Forbes Lithograph Company as a result of the activities conducted under your supervision at the New York office?

A. The book lists a series of items that we manufacture, such as 24-sheet posters, booklets, carton, boxes, letter-heads, containers and so on.

Q. Can you tell me the average number of gum wrappers per pound, if you know?

A. There is no average.

Q. Can you give us an approximate average?

A. They will vary from 1000 up to about 2500.

Q. Would 1000 be the minimum?

A. There would even be a little difference there, and it may come down to 800, something like that.

Q. Gum wrappers of the same size that you have referred to?

A. That is the standard gum wrapper that I give you. That is what you asked for, isn't it?

Q. Yes.

A. That is the regular 5-stick wrapper.

Q. What are the number of gum wrappers of that kind per pound, minimum and maximum?

A. That all depends on the coverage, whether it is a four or five color job.

[fol. 54] Q. I said minimum or maximum.

A. Also the medium makes a difference. We print them on cellophane; we print them on paper; we print them on glassine.

Q. Will you give us the average.

The Court: I don't see what the value of that is; it does not translate anything in my mind. All I can find

out is that he testified that there are 125 tons of gum wrappers manufactured, is that right?

The Witness: Yes.

Mr. Proskauer: 25 trucks would carry that.

Mr. Herwitz: That is about it.

Q. You say the book lists the work that is done by your company; do you mean Plaintiffs' Exhibit 3 for Identification?

A. This book right here (indicating).

Mr. Herwitz: I offer this book in evidence unless there is objection.

Mr. Proskauer: No objection.

The Court: Received.

(Plaintiff's Exhibit 3 for Identification received in evidence.)

Q. How many offices are there of the Forbes Lithograph Company?

A. Sales offices?

Q. Offices of any kind.

A. I think there are five.

Q. Where are they?

A. You will find them on the front page. They are listed there. There is Rochester, Cleveland, Boston, New York and Philadelphia Division, which is in New York.

The Court: What about Chicago?

The Witness: And Chicago.

Q. Have you described what is meant by a display that is listed in Plaintiffs' Exhibit 3? What are displays?

[fol. 55] A. Displays are those things that advertise a man's product; it can be a window display or a counter display—

By the Court:

Q. It is a setup, isn't it?

A. Yes, it is a setup. That would define it.

By Mr. Herwitz:

Q. Is there any way you have of describing the weight volume or number of pieces produced by the company as a result of the activities of your outfit at 10 East 40th Street?

Mr. Proskauer: I am objecting to that. The question is improper.

The Court: Sustained.

Q. How many different items of creation are made in the course of a year at your office in New York?

Mr. Proskauer: I object to that.

The Court: Overruled.

A. Not very many. I would say in the neighborhood of ten or a dozen, that is creative.

Q. Yes, creative work. How many items are there made at your office where the artist either creates it or translates it after it has been created by the customer? Do I make myself clear?

A. You mean in other words he may do work on it whether he creates it or somebody else creates it?

The Court: Participates in the development of it.

A. (Continued) I would say two artists and the assistant are director are kept busy the entire year.

Q. That is one way of answering it. Can you answer my question more specifically as to the number of different [fol. 56] items that those artists work on in the course of a year?

A. I cannot very well answer that, because one job may take two weeks; another job may take five months.

By the Court:

Q. Are there requests for the artists' work which do not materialize into orders?

A. Oh, a great many.

By Mr. Herwitz:

Q. The purpose of having those artists is to have their work materialize into orders if possible. Limiting yourself to the items that these artists work on which result in orders in the course of a year, can you give us any figure of the number?

A. No, I cannot.

Q. Or any estimate?

A. No, I cannot.

Q. Do you have any idea of the number of different items of all kinds—not pieces, but separate items?

A. Orders, you mean?

Q. Orders, let us say, for different items received by your company at the office 10 East 40th Street in the course of the year.

A. In other words, you would group orders for 24-sheet posters as one?

Q. Correct.

A. I cannot give you that. I can say that we take orders for almost all those products as listed in that exhibit.

The Court: Plaintiffs' Exhibit 3?

The Witness: Yes, sir.

Q. Are these orders reckoned by the hundreds in the course of a year?

A. No.

Q. Less than that?

A. Less than that, yes, sir.

Q. You mentioned something about printed cellulose—

A. That is printed transparent cellulose. That is cellophane acetate.

[fol. 57] Q. Is there any other factory except the one in Chelsea, Mass.?

A. No.

Q. Is there anything different about these acetate or cellulose businesses—I mean is it conducted in any different way?

A. No. It is all handled the same way.

Q. We served you with a subpoena, did we not?

A. That is right.

Q. Do you have a copy of it?

A. Yes (handing paper to Mr. Herwitz).

The Court: Offer it for identification.

(Marked Plaintiffs' Exhibit 4 for Identification.)

Q. Have you been able to produce the articles called for in that subpoena?

A. I have only some exhibits here, or whatever you want to call it, which I picked up. I haven't been able to pick up all the records, because they are not all—

The Court: When was the subpoena served?

The Witness: I would say about 5 o'clock last night.

Q. What records have you produced, Mr. Osborn?

A. I procured some package memorandum slips. Every time a shipment is made to Boston, a package memorandum slip is made out showing the type of material that is put in that package and shipped to Chelsea. When I say "Boston," I mean Chelsea, Massachusetts. I have only a few of those. I have a list of the express charges for the year 1942, which involve both the 30th and the 22nd floors.

Q. Can you tell us the amount of money spent on express charges during that year?

A. Yes, a total of \$228.83.

Q. That includes both floors?

A. That includes both floors.

Q. Do you have any telephonic or telegraphic communication with the office at Chelsea, Mass.?

A. Yes, we have telephone, teletype, and of course letters.

[fol. 58] Q. How long have you had a teletype machine there?

A. Ever since I have been there.

Q. Do you happen to know how that operates between your company and the Chelsea, Mass., company—the main office in Chelsea?

A. I don't quite understand what you mean.

Q. How do you use your teletype machine, what purpose do you use it for?

A. A customer might call us up and ask for delivery information, and he must have it quickly for his plant, and we use the teletype to furnish that information.

Q. Do I understand that the customer deals with you even as far as shipments are concerned?

Mr. Proskauer: That is a very indefinite question.

The Court: I will allow him to say yes or no.

A. I would say yes and no. He deals both with us and direct with Chelsea.

Q. Does that vary with the customer?

A. That is part of the sales order—the shipping instructions.

Q. Suppose you tell us about that. We want to know that.

A. Every order that is entered will carry in a certain designated place on the order "Shipping Instructions." They will ask us to ship material to such and such a place on such and such a date. They will even sometimes request how that material is to be shipped. Sometimes they will leave that up to the traffic department located in Chelsea. A New York customer getting close to the time when he wants delivery, will double check it and will naturally call the salesman in the office and ask him to check with Chelsea and advise him.

By the Court:

Q. Suppose there is a customer outside of New York, does he ordinarily communicate with the New York office [fol. 59] or does he communicate with the factory at Chelsea, Mass.?

A. It is about 50-50 I would say.

By Mr. Herwitz:

Q. Do you have customers in Newark, New Jersey, let us say?

A. Yes.

Q. Give us the names of some of your customers in Newark, New Jersey, just one or two.

A. The only one I can think of is the M. & M. Ltd. and Ivers Lee Company.

Q. If they have difficulties with deliveries, do they communicate with you or with the company in Chelsea?

A. I would say M. & M. and Ivers Lee do sometimes because they are old customers and they will call Chelsea.

Q. Do I understand in connection with matters such as speeding deliveries for customers, you would use the teletype, is that correct?

A. Yes, that is to get information.

Q. You have both a sending and receiving set?

A. Yes, to get and give information.

Q. In other words, the factory in Chelsea, Mass. can both send and receive?

A. That is correct.

Q. Do you have a teletype operator?

A. One of the stenographers—rather, both the stenographers can operate the teletype.

Q. Is that extensively used?

A. Not a great deal, no.

Q. Is it used every day?

A. Yes, I would say so.

Q. Do you also use the telephone to communicate with the office in Chelsea, Mass.?

A. That is right.

Q. Do you have conversations on the telephone in connection with the production of merchandise that you have received orders for?

A. Well, just what do you mean by "production"? We do not tell them how to manufacture. We might ask them questions pertaining to the status of the order as to how it has gone along, that is how far along it is in production.

Q. You say you have artists at your premises. They [fol. 60] make a layout which ultimately goes up to the factory to be printed or to be lithographed, is that correct?

Mr. Proskauer: You mean in some cases?

Mr. Herwitz: In some cases.

A. Yes.

Q. Are there some cases where there is conversation concerning any changes to be made after it goes up to Chelsea, Mass.?

A. Yes.

Q. Would such changes include changes of outline, size, color, lightness or darkness—things of that kind?

A. Yes.

Q. And are there telephonic communications between your office and the factory in Massachusetts in connection with such changes?

A. Yes.

Q. That is what I meant by conversations with regard to the production of these items which are created or which you get orders for at 10 East 40th Street.

A. Yes.

Q. Is the teletype also used in connection with that?

A. Yes.

Q. Are instructions given on the teletype with regard to the size or the color of the outline or anything else in regard to the actual production of the items which are taking

place at the Forbes Lithograph Company in Chelsea, Mass.?

A. Yes.

Q. Are any instructions given by means of the teletype or by means of the telephone to the effect that an order is on the way out or that a layout is on the way out to be delivered at the factory for certain preparations, for production?

A. Yes.

Q. Do you do any traveling, Mr. Osborn?

A. Yes.

Q. Where do you travel?

A. Mostly to Chelsea.

Q. Is that frequently that you do that?

A. Once every three weeks at least.

Q. And do you go up to Chelsea for a variety of reasons?

A. Yes, for a variety of reasons.

Q. Will you state the reasons for going to Chelsea?

A. The main reasons for my going to Chelsea are to work [fol. 61] on the rotogravure department, to help plan production and try to help in connection with that plan.

Q. Is that in connection with the work you do at 10 East 40th Street?

A. Yes, sir.

Q. Will you tell us the relationship between the work at 10 East 40th Street and the plan of production work you do when you go to Chelsea, Mass.?

A. Four years ago, approximately, I was made manager of the Cellophane Division, which is the Rotogravure Division. I moved from New York to Boston. At the end of the year I was made New York sales manager, but still kept control of the Rotogravure Department, which meant that I would try to operate the Rotogravure Department from New York. When it comes to the question of managing that department, my work is confined almost entirely to sales produced in that department, together with my associate in Boston who handles the actual schedule of production in that department.

Q. Do I understand, Mr. Osborn, that you are familiar with the production of that particular department?

A. Yes, sir.

Q. Were you a production man originally?

A. I helped start the department.

Q. Who is your associate in Boston whom you just mentioned?

A. Mr. Coombs.

Q. Is he your assistant?

A. Yes.

Q. You are still head of the Rotogravure Department, and Mr. Coombs is your assistant?

A. That is correct.

Q. As head of the department, you are nominally at least in charge of production, is that correct?

A. Nominally, but as I say I don't do that, because we have a general factory superintendent of the Forbes Lithograph Company under whose general supervision the actual production would come.

Q. I said nominal.

A. Yes.

Q. Do you go to Boston and Chelsea, Mass. in connection with that department?

A. Yes.

[fol. 62] Q. Do you go there in connection with the production in that department?

A. Yes.

Q. And do you have telephone conversations in the interim between meetings?

A. Yes.

Q. From your office at 10 East 40th Street concerning the production at that department?

A. Yes.

Q. Does the Forbes Lithograph Company have customers all over the country?

A. Yes.

Q. Do you know the total volume of business done by the Forbes Lithograph Company?

A. No, I do not.

Q. Have you any approximation of it?

A. Yes.

Q. How much?

A. Do I have to answer that?

The Court: Is this the whole country?

Mr. Herwitz: Yes, your Honor.

The Court: What is the materiality of it?

Mr. Proskauer: I will concede it is a very large company.

Mr. Herwitz: I will take that concession. I think, your Honor, its materiality comes from the fact that it is our contention that this office at 10 East 40th Street is an integral part of the whole, and I think we ought to have some approximation of it.

The Court: Go ahead.

Q. Is it over \$5,000,000, Mr. Osborn?

A. I don't think it is.

Q. Would it approximate that?

A. Somewhere around that.

Q. Somewhere around \$5,000,000, is that correct?

A. I don't know. I could only give you an estimate, a rough estimate, and I would rather not answer that unless I have to.

Q. Would you tell us the proportion of the business done by the Forbes Lithograph Company that comes out of your office at 10 East 40th Street. I am confining it to [fol. 63] your office.

A. I cannot tell you that because I don't know the grand total. I told you what I was responsible for.

Q. \$2,000,000, would that be the figure?

A. In the neighborhood of \$2,000,000.

Q. Do you know whether or not it is approximately one-half of the total business done by the company?

A. I would say somewhere in between a third and a half. I don't know what the figures are.

Q. All right. I think you said there were seven rooms in your office, did you not?

A. That is right.

Q. Do you know what equipment there is in your office for the use of the artists?

A. Yes, I do.

Q. Can you tell us what it is?

A. There are three drawing tables; there are pencils, inks, supplies, paper and board for those men to work with.

Q. And how many rooms are used by those men?

A. One.

Q. How large a room is it?

A. I would say about one-third the size of this room.

Q. Would it be possible for you get for us one or two samples of the original printing done at your office and which is ultimately sent up to Boston for finishing?

Mr. Proskauer: Wait a minute, there isn't any evidence that there was any original printing done at this office.

Mr. Herwitz: I think you are wrong, but I will ask him.

Q. These artists at your office make the picture, do they not?

A. That is right.

Q. You testified to that, did you not? And from that the picture is sent to Boston, is it not, or Chelsea, Mass.?

A. Yes.

Q. And the lithographing process is then used to reproduce the picture that they have made in your office, is that correct?

A. That is correct.

[fol. 64] Q. And that lithographing process is the taking of the painting that has been made in your office by photograph and then reproduced by printing, is that right?

A. That is partially right, yes. In a great many cases the actual finished print—90 per cent is done by outside artists, because our men cannot cover every field of art. They are commercial artists. They do simple work, but when it comes to real painting, that is done by other artists.

Mr. Proskauer: That is what I understood.

Q. It was my understanding that some of these products were done in your office.

A. That is correct, when it comes to a gum design, that is done there.

Q. Will you let us have in the next two or three days, if we are on trial at that time, samples of the original made in your office and the sketch or whatever it is which is sent to Chelsea, Mass., which is reproduced and the finished product which results therefrom?

A. I believe I can furnish that.

Mr. Herwitz: That is all.

Cross examination.

By Mr. Proskauer:

Q. Mr. Osborn, your company occupies two different spaces in this building, is that correct?

A. That is right.

Q. And the aggregate of those two spaces, as I have it here, is 3360 square feet, is that about right?

A. I think that is about right.

Mr. Proskauer: For your Honor's information, I calculate that as $1\frac{1}{2}$ per cent of the rentable area of the building. It has been stipulated what the rentable area of the building is.

Q. Up on the 22nd floor, just who occupies that?

A. That space is occupied by two salesmen, Mr. Hardy, the art director and the office boy and two secretaries.

[fol. 65] Q. And the area of that space, as I have it, is 1100 square feet, is that about right?

A. That is correct.

Mr. Proskauer: That is $\frac{5}{10}$ ths of 1 per cent of the total area of the building, your Honor.

Q. Where are these three artists which you say you maintain, where are they situated?

A. There are two working artists with the assistant art director and those are maintained on the 30th floor.

Q. The 30th floor, that is your Sales Division, isn't it?

A. That is correct.

Q. And this 22nd floor is where Mr. Hardy has his office?

A. That is also a Sales Division.

Q. So there is also sales work done there?

A. Yes.

Q. So that of that 1100 square feet, only part is devoted to any portion of the art work?

A. There is no actual art work done there, as Mr. Hardy testified this morning.

Q. So there is nothing done there which is sent up to Chelsea?

A. That is correct.

Q. When you come to the 30th floor, your space there, as I have it, is 2260 square feet, which is 1 per cent of the

total area of the building; how much of that 2260 square feet is occupied by these three artists?

A. Well, the art director has an office, the assistant art director has an office, but he does no work in there, just consultation work. The two commercial artists occupy a space 6 by 5 for each man, which would mean—

Q. About 100 square feet?

A. I would say 80 to 100 feet would cover the entire space occupied by the commercial artists actually doing the work.

Q. The balance of the 2260 square feet on the 30th floor, who occupies that?

A. There are eight salesmen exclusive of myself, a switchboard operator, two stenographers and a conference room.

Q. And that is the setup on the two floors?

A. We do have a wrapping-room and combination sample room.

[fol. 66] Q. You told us about that.

A. Yes.

Q. Referring to your own work, do you actually direct any of the manufacture that is done at Chelsea?

A. None whatsoever. I cooperate with my associate and assistant up there, Mr. Coombs; I discuss his schedule with him and advise him as to the customers' wants and desires, so that in this time of manpower shortage we can take care of things as well as possible.

Q. But the actual administration of it is not subject to your direction?

A. No.

Q. The physical manufacturing is done at Chelsea?

A. That is so.

Q. As I understand it, there is a large number of customers who do their own designing and just ask you to reproduce it, is that correct?

A. That is right.

Q. None of your people do any work on that in New York, do they?

A. No, they do not.

The Court: That is what you call non-competitive?

The Witness: It is competitive, but it is non-creative.

Mr. Proskauer: I was trying to think of the word, I know it isn't non-competitive—it is non-creative.

Q. What proportion of the volume of sales that go through your New York office is that non-creative work?

A. You would have to tell me, do you want both floors?

Q. Both floor; yes.

The Court: Can you separate them?

The Witness: Yes, I think I can. The 22nd floor is almost all creative work, as Mr. Hardy told you this morning.

Q. That is the smaller floor?

A. That is the smaller floor, that is the 22nd. It is just [fol. 67] about 50-50, which would make our office creative and the balance competitive, both offices combined.

The Court: You used the word "competitive."

Q. You meant creative?

A. I meant that about 90 per cent is competitive and 10 per cent creative.

The Court: Are competitive and creative the same thing?

The Witness: That is right.

Q. On the overall on the two floors, how much of your total is wholly non-creative work—what percentage I mean.

A. On the overall picture—this is just a guess, I would say 60 per cent competitive and 40 per cent creative.

Q. When you say it is a guess, you mean it isn't exact, but it is just rough estimate?

A. Yes, sir.

Q. Your main objective in New York is acting as the sales organization, is it not?

A. That is right.

Q. You testified in a deposition here, and I have this answer to this question, and ask you if that is correct:

"Q. And as I understand it your outfit is a selling organization?" and you answered, "Entirely."

"Q. You do not complete the sales, do you, they are completed at the home office?

"A. That is right.

"Q. That is the final acceptance of the sale is done at the home office?

A. That is right.

"Q. You do not close the contract here?

"A. That is right.

"Q. You report it to Chelsea?

"A. Yes."

You so testified?

A. Yes.

Q. In order to make assurance doubly sure, none of the physical work that goes into the making of your finished product is done in New York, it is all done in Chelsea, is that correct?

A. It is all done in Chelsea.

Mr. Proskauer: That is all.

[fol. 68] Re-direct examination.

By Mr. Herwitz:

Q. You say none of the work done in New York goes into the product that is done in Chelsea?

A. That is right.

Q. If you make painting in New York, you send it to Chelsea, Mass.—

Mr. Proskauer: My question was directed just to the physical article.

A. No part of the art work or painting finds its way into production.

Q. Just the lines, colors and size and dimensions?

A. That is just a copy we follow in reproducing, because the customer gets his finished art work back and generally frames it.

Q. You spoke about the non-creative part of the business as distinguished from the other part. As to the non-creative part, do you mean that the thing that is sent up to Chelsea, Mass. for reproduction for lithographing and reproduction is made entirely by someone other than your office?

A. In 98 per cent of the cases.

Q. Not entirely so?

A. No.

Q. Now, what is the exception?

A. Let me see if I may just take a second to clarify this. Most of these companies have their own art departments or they employ advertising agents who also have art departments. Before we get the art work, in a great many of competitive jobs, that has all been checked over very carefully with the customer's art department or the agency

and customer, whichever it is, and is then submitted for competitive bidding, where they will receive from three to ten copies from printers and lithographers throughout the City and if we are successful in procuring the business, the art work is sent for reproduction. If they find the art work coming from their art department or their agency and the lettering perhaps becomes scratched or dirty while [fol. 69] being transferred to our office, we would fix that up probably before sending it to Chelsea.

Q. Does this picture come to your premises at 10 East 40th Street before being sent to Boston?

A. Generally.

Q. And then you look to see if it is in proper shape for reproduction?

A. We assume when it comes over to us that it is in shape, but if it should happen to become dirty—

Q. Then you would retouch it?

A. If it becomes extensive, we send it back to the customer, but we will take care of it for him if he wants us to.

Q. I suppose these artists who are in your own office have the run of your office?

A. Yes.

Q. Is it their practice to confer with you concerning the creation of the work that is to be done?

A. That is usually done in the artists' quarters.

Q. That is confined to the cubicle that you mentioned?

A. That is where the actual work is done.

Q. The actual brush work?

A. Yes.

Q. As far as receipt of orders is concerned and the completion of sales, you have a great many steady customers, do you not?

A. Yes.

Q. Whose credit you know all about?

A. Yes.

Q. And whose orders are accepted without question, is that right?

A. Yes.

Q. If you go out and solicit an order from them or an order comes to your office at 10 East 40th Street, you don't tell them, "We will see whether Chelsea, Mass. will accept it," do you?

A. In a great many cases, we do.

Q. With regular customers?

A. With regular customers.

Q. Is that on the basis of credit?

A. No, that is on the basis of the time element, as a rule.

Q. Whether or not you can do the job in the time required?

A. Yes, and also price; there is also a question of price.

Q. Did you say you had a teletype?

A. Yes.

[fol. 70] Q. And you consult the factory in Chelsea with the view of determining whether or not they will be able to do the job?

A. Sometimes we can but most of the time we cannot, because the factory has to see what it is in the way of reproduction before they can say.

Q. Are you the one who notifies the customer whether you will take the job at the price stipulated, and so forth?

A. In most cases, yes.

Q. Was that always the practice or has it recently been changed because of the war conditions?

A. I have been in charge of the office about three years and that has been the practice since I have been there.

Mr. Herwitz: That is all.

I will now call Mr. Meckbach.

Mr. Proskauer: My information is that this gentleman represents the General Motors Company. It has Room 1907, whose area is 2140 feet and is 9/10th of 1 per cent of the rentable area of the building; that they do not manufacture anything on the premises, but that they do ship certain small parts out of the building and that from October 24, 1938 to May 31, 1942, they shipped out in small parts approximately \$191,400, and of that \$82,700 in round numbers went into interstate commerce; that they shipped out some small parts which were manufactured elsewhere to the extent I have indicated and I will be glad to stipulate that if you will take it.

THEODORE L. MECKBACH, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Theodore L. Meckbach.

[fol. 71]: Q. And your address?

A. 229 Maplewood Avenue, Bogota, New Jersey.

Q. Mr. Meckbach, what business are you in?

A. We operate a sales and service office.

The Court: What is your connection with the company?

The Witness: Office Manager.

The Court: What is the name of your company?

The Witness: The Cleveland Diesel Engine Division of General Motors Company.

Q. Will you state what business that company carries on in New York?

A. We have the sales and service office, and in connection with that we do repair and furnish displacement parts for Diesel engines of our manufacture.

The Court: Where do you get the parts which you ship out from your office at 10 East 40th Street?

The Witness: From our factory at Cleveland and vendors in and outside of the City.

Q. To whom do you sell it, I mean what customers, in what neighborhood, what locality?

A. All over.

Q. Does that include States out of New York?

A. Oh yes.

The Court: Have you made any computation of the sales of parts between October 1938 to May 1942?

The Witness: Yes, sir, I have.

The Court: What does that amount to?

Mr. Proskauer: I have it in the schedule, your Honor.

The Court: What does that amount to?

The Witness: The gross sales covering that period, sir, amount to \$191,403.

[fol. 72] The Court: What part of that was in interstate commerce?

A. \$82,736.84.

Q. What is this service business that you carry on?

A. We have service engineers who go out and make adjustments and trouble shooters.

Q. Is any of that work done on the premises?

A. No.

Q. Do any of the machines go into the premises to be worked on?

A. No.

WILLIAM L. SEARLES, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name.

A. William L. Searles.

Q. And where do you reside?

A. 81 South Road, Harrison, New York.

The Court: With what concern are you connected?

The Witness: The Tennessee Eastman Corporation.

Mr. Proskauer: Would you use his deposition, Mr. Herwitz?

Mr. Herwitz: No.

The Court: In what capacity are you employed?

The Witness: I am in charge of the New York office.

Q. What business is the Tennessee Eastman Company in?

A. In the manufacture of chemicals and chemical products.

[fol. 73] Q. Where does the manufacturing take place?

A. In Kingsport, Tennessee.

Q. How long have you been connected with the company?

A. Approximately 10 years.

Q. How long have you been located at 10 East 40th Street?

A. I believe since 1938.

Q. How many people work at those premises?

A. Five, including myself.

Q. What jobs do these various people have?

A. Two are young lady secretaries, one a service engineer and one a sales engineer. I am a sales engineer.

The Court: Do you know the square foot area occupied by your concern?

The Witness: I think it is approximately 1,200 square feet.

The Court: Do you gentlemen agree on that?

Mr. Hertwitz: Yes, we will agree in each case as to the amount of area.

Mr. Levin: It is 920 square feet, subject to correction.

Mr. Hertwitz: As to any witnesses called subsequently, we will agree as to the area.

Q. Are you in constant communication with the main office of the company?

A. Yes.

Q. Do you have telephone connection with the main office or teletype connection?

A. Yes, we do.

Q. Do you sell the products of the company?

A. We promote their use and try to sell them.

Q. You promote their sale?

A. Yes.

The Court: Do you take orders for goods?

A. We will take the order and relay it to the factory in Kingsport, Tennessee, subject to the acceptance of it there. No transaction is completed by us.

[fol. 74] Q. It is your job to make sales and promote sales?

A. That is right.

Q. You go out and get the sales here?

A. No.

Q. In what locality are your customers?

A. Connecticut, New York State, New Jersey, Pennsylvania.

Q. What is the volume of the business done by the New York office?

A. We have no records that show that. We do not keep records with the idea of determining how much business the New York office is responsible for.

Q. In addition to communication with the main office in Tennessee, by teletype, do you communicate with them by mail and telegram from time to time?

A. Rarely telegraph.

Q. Are there any other firms in this building with which your company is connected?

A. Yes.

Q. Which company?

A. A. M. Tenney Associates.

Q. What connection does that company have with your company?

A. They are the sales agents for Eastman acetate yarn, manufactured in Kingsport, Tennessee.

Q. Is that a particular product of your company?

A. Yes, sir.

Q. And do you sell different types of products of the same company?

A. Yes.

Q. What space is occupied by the Tennessee Eastman Corporation?

A. The 39th floor.

Q. How long have they been there?

A. Since, I believe it was 1938.

Q. Did you move there at the same time, both of you?

A. Yes.

The Court: How much square footage do they have?

Mr. Levin: 9,470 square feet on the 39th and 40th

floors.

Q. Do you have any research laboratory connected with your company—with your work?

A. At Kingsport, Tennessee, yes.

[fol. 75] Q. Do you have any in this building in these premises?

A. No.

Q. You have no such laboratories?

A. No.

Q. Do you keep any merchandise on hand?

A. No, sir.

Q. You keep samples, do you?

A. No.

Q. You don't have any samples of the products which you sell?

A. We just have small samples for visual inspection, to show someone what it looks like in its raw form.

Q. You have no samples of the finished product?

A. We have mailed samples—mailed by customers representing various uses of the raw material.

Q. Do you make sales or promote sales by means of the telephone?

A. Yes.

Q. And do you call customers in New York, New Jersey and neighboring States?

A. Yes.

Q. And do you have visits from customers?

A. Yes.

Q. From various states other than New York?

A. Yes.

Q. What is the nature of your usual communications between yourself and the Tennessee Eastman Company in Kingsport, Tennessee, by means of teletype, for instance, and if so, what use is made of that?

A. We will relay to Kingsport a question of customers, as to when a certain shipment of material may be expected and try to get information on shipments of material at Kingsport for customers.

Q. Do you know if the factory sends its merchandise to various states of the Union, all over the country?

A. Yes, sir.

Mr. Proskauer: We will concede that.

The Court: I suppose it may be assumed that counsel will stipulate that whenever the Eastman Company in Kingsport, Tennessee, accepts an order for merchandise [fol. 76] manufactured by it, it ships that merchandise wherever the point of consignment is designated to be?

Mr. Proskauer: Certainly, your Honor. There is no doubt that they are engaged in interstate commerce.

The Court: Then you need not waste time on that.

Q. Do they have merchandise on hand ordinarily at the Kingsport plant?

A. No, sir, it is all made to order.

Q. In other words, when you send them a direction, it is a direction, or if you send them information concerning an order, that direction or information which you supply causes them then to produce, pursuant to that direction, the order?

Mr. Proskauer: There isn't any direction.

A. There is no direction involved on our part. We simply relay the customer's request for a certain amount of material.

Q. That is to be made up pursuant to your relay, as you call it?

A. If it is possible, of course.

Q. If it is accepted?

A. If it is accepted, the factory comes as near making what the customer wants, as possible.

Q. You send advices to Tennessee when somebody wants to buy—

Mr. Proskauer: Something to be made up for them.

The Court: When there is something to be made up, you advise the Tennessee Corporation that somebody wants something made up?

The Witness: Yes, by means of relaying the order.

[fol. 77] The Court: I wanted to ask about the order because everybody was avoiding it, but I thought I would. When they accept that advice by you or order, then the merchandise is made up?

The Witness: Yes, sir.

Mr. Proskauer: Shipped directly from the factory.

The Court: That is already stipulated.

Q. Can you give us an estimate or approximation of the volume of business done out of your office?

A. It would be a very wild guess and probably not worth much.

Q. Suppose you give us the minimum and the maximum?

The Court: Do you keep any record of orders that you send to Kingsport?

The Witness: Yes, we do.

The Court: How do you keep those, in what form?

The Witness: They are filed in a loose-leaf binder.

The Court: Does it appear on those orders what the price of the merchandise to be manufactured is?

The Witness: No.

Q. Don't you know when you receive an order, what the price of the merchandise is?

A. Yes, sir.

Q. Don't you keep records of that?

A. Prices are standard on the published price list. They do not vary. There is no concession on prices. The prices are exactly as set forth in our published price list and there is no variation of terms.

Mr. Proskauer: Would it be satisfactory if I ask this gentleman to give you his loose-leaf book which contains his orders and price list and anything you calculate from it I will stipulate?

[fol. 78] The Court: Assuming he is a good mathematician.

Mr. Proskauer: I will take that chance.

Mr. Herwitz: I prefer to get through with it rather quickly if we get a general approximation.

Q. Is it more than a million dollars?

A. For a year?

Q. Yes.

A. I would say roughly it is approximately a million dollars.

By Mr. Proskauer:

Q. You don't manufacture any of that?

A. No, sir.

The Court: Are you through with his direct examination?

Mr. Herwitz: Yes.

Cross-examination.

By Mr. Proskauer:

Q. You don't have any merchandise in New York?

A. No, sir.

Q. You just promote interest and give advice?

A. Yes, sir.

LAWRENCE W. GUETERSLOH, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Lawrence W. Guetersloh.

Q. And your address?

A. South Salem, New York.

Q. Where do you work, sir?

A. The Eastman Kodak Company.

Q. At what premises?

A. 10 East 40th Street.

[fol. 79] Q. What floor is that on?

A. 22nd floor.

Q. How long have you worked there?

A. Since the property was leased.

The Court: How much space do they occupy?

Mr. Herwitz: Do you have the figure?

Mr. Levin: 2500 square feet.

The Court: That is on the 22nd floor. How long have they occupied that space?

Q. Do you have the records on that?

A. I could not say offhand.

Mr. Levin: December 1939, your Honor.

Q. How long have you worked there?

A. Since we signed that lease.

Q. That is since about December 1939?

A. Yes.

Q. What business activities are carried on at those premises?

A. The making of photographic illustrations.

Q. Will you please give us a lecture on exactly what that is?

The Court: No, we don't want any lectures. You might want, but I used to represent the Eastman Kodak Company and I don't want any lecture. I was born in the Kodak City and I know what the Eastman Kodak Company is.

Q. What is done at these premises and what is the purpose for which the work is done?

The Court: Let us have it first, this is the Eastman Kodak Company of Rochester, New York?

The Witness: Yes.

A. We make photographic illustrations used in advertising and publicity of the products of the Eastman Kodak Company.

[fol. 80] Mr. Proskauer: He does not mean that he does advertising for other people; it is just the advertisement department of the Eastman Kodak Company itself.

The Witness: That is true.

Q. When these photographs are made, are they sent to another city?

A. All photographs made in our studio are delivered to us on the 40th floor.

Q. Will you tell us what processing, as the Judge says, is utilized for making pictures on the 22nd floor?

A. Well, the products are usually sent in to us and the photographer and myself confer with the individual who is writing the copy and a decision is arrived at as to the manner of presentation and then the photograph is made, printed and delivered to the 40th floor.

Mr. Proskauer: You prepare the material for the advertisements?

The Witness: Yes, the photographic material.

Q. You produce photographs?

A. Yes.

By the Court:

Q. By what means do you make the photographs?

A. By the use of lighting equipment, camera equipment, certain chemicals—

Q. How many cameras do you employ?

A. About seven cameras.

Q. You take prints from the film after it has been developed and those prints you send up to the 40th floor?

A. That is right.

Q. Do you take any orders there for merchandise?

A. Oh, no.

Q. Do you sell anything?

A. No.

[fol. 81] By Mr. Herwitz:

Q. Do you have a darkroom there?

A. Not on the 40th floor.

Q. On the 22nd floor?

A. Yes.

The Court: You have to have for the purpose of making developments.

Q. Yes. How many prints are made on an average by you in the course of a week, let us say, on an average?

A. By me or by the staff?

Q. By the staff.

A. Oh, I would judge between a hundred and two hundred.

Q. A week?

A. A week.

Q. Is anything else except prints made there by the staff?

A. Negatives from which the prints are made.

By the Court:

Q. The negatives are exposed and then prints are made?

A. Yes.

By Mr. Herwitz:

Q. Is any copy work done on the premises?

A. Not on the 22nd floor.

Q. Is some copy work done at some place in the building?

A. The copy is written on the 40th floor.

Q. Do you go to the 40th floor to confer with the copy writer?

A. Occasionally.

Q. As you have previously described?

A. Yes.

By the Court:

Q. Who is the man in charge of the 22nd floor?

A. I am.

[fol. 82] **Q.** Who is the man in charge of the 40th floor?

A. Mr. Tuttle.

By Mr. Herwitz:

Q. Is there any other space occupied by the Eastman Company in the building that you know of?

A. I don't know.

Q. Is there any space on the 24th floor occupied by them?

A. I don't know.

Q. Is it your statement that you only have to do with the 22nd floor and the 40th floor?

A. That is true.

Q. Is your company connected with the Tennessee Eastman Company?

A. Tennessee Eastman I believe is a subsidiary of the Eastman Kodak Company.

Q. Do you take photographs of the finished products of the Tennessee Eastman Company?

A. I work solely for the Eastman Kodak Company and my orders come from the Eastman Kodak Company.

Q. I understand that, but do you take photographs of the finished products made—that is, products of the Tennessee Eastman Corporation?

A. Yes.

Q. Is that a considerable amount of work that you do?

A. Yes.

Q. Can you give us the proportion of the work that you do in that connection?

A. Practically all of it.

Q. That has to do with the end products, I believe you call it, of the Tennessee Corporation?

A. Yes.

Q. Do you know what happens to your prints after they are delivered to the advertising office?

A. Well, the majority of them are used in publicity campaigns. Some few are used as advertising and some few are used as posters.

Q. And do you know whether the reproduction of the pictures that you take are sent out of the premises at 10 [fol. 83] East 40th Street to other States in the Union?

A. I don't know.

Q. Well, do you know whether reproductions of pictures taken at the premises 10 East 40th Street are not in newspapers and magazines published in other States of the Union?

A. I don't know.

Q. Haven't you ever seen them?

A. I have never paid much attention to that.

Q. Does that mean that you have never seen any such thing?

A. It means that I never paid much attention to that. My chief interest is in local New York papers and certain technical journals which are published in New York City or thereabouts.

Q. What technical journals do you speak of?

A. Well, Modern Plastics.

Q. Any other journals?

A. Product Engineering. Those are the only two I am familiar with.

Q. Do you know whether those magazines are sent to the trade?

A. I suppose so.

Q. Is that a national business?

A. I don't know.

Q. Have you made up any booklets—educational booklets?

A. I don't understand the term "educational booklets."

Q. Have pictures that you have taken appeared in booklets or pamphlets which are made up and sent out?

A. Yes.

Q. Do you know where these booklets are made up?

A. No.

Q. Do you know where they are distributed?

A. No.

Q. Do you know who distributes them?

A. No.

Q. Do you know whether they are initially distributed by the Advertisement Department of the Eastman Company?

A. I don't know.

Q. You have no knowledge of that whatsoever?

A. My work is limited solely to the production of pictures. Other than that I don't know.

[fol. 84] Cross-examination.

By Mr. Proskauer:

Q. You do not sell these pictures that you take, do you?

A. No.

Q. They are just used for advertising of Eastman products?

A. Yes.

Mr. Proskauer: That is all.

Re-direct examination.

By Mr. Herwitz:

Q. Would you say these pictures are used to aid in the selling of Eastman products?

Mr. Proskauer: I will concede that.

Mr. Herwitz: Thank you.

Mr. Proskauer: Also Eastman Tennessee products. I will also concede that.

RAY C. TUTTLE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Ray C. Tuttle.

Q. And your address?

A. 38 Claremont Road, Scarsdale, New York.

Q. What business are you in, Mr. Tuttle?

A. Eastman Kodak Company.

Q. Where do you maintain your offices?

A. 10 East 40th Street, New York City.

Q. What space do you occupy there?

A. Part of the 40th floor.

Q. What is the number of the suite?

A. 4010 at 10 East 40th Street.

[fol. 85] Q. How many people work at those premises?

A. In out suite on the 40th floor?

Q. Yes.

A. Approximately six or eight.

Q. How many work there now?

A. Eight.

Q. What do these various people do—what are their functions?

A. They write copy and send out photographs and other publicity material.

Q. All these eight people do that?

A. Yes.

Q. Don't you have any stenographic and clerical help in addition?

A. All of them perform one or other of the functions I have named, in addition to other things.

Q. Does your company, the Eastman Kodak Company, have other suites in the building in addition to your space and the space occupied by the art department on the 22nd floor?

A. Not to my knowledge.

Q. Do you, in the course of your business, have anything to do—any business with any other tenant at 10 East 40th Street?

A. No business that I can think of.

By the Court:

Q. Do you have any relationship with the Tennessee Eastman Company?

A. The Tennessee Eastman Corporation is a subsidiary of the Eastman Kodak Company.

Q. I say, do you have any business with that company?

A. Not directly.

By Mr. Herwitz:

Q. Do you have any indirect business with that company?

A. I work for the Eastman Kodak Company and the Eastman Kodak Company is in a managing capacity with respect to the Tennessee Eastman Corporation.

Q. And do you do your work for the Eastman Company with respect to that management work of the Eastman Company over the Tennessee Eastman Corporation?

A. Possibly.

[fol. 86] Q. Will you tell us what you do?

A. We send out news matter and photographs.

The Court: Relating to what?

The Witness: Relating to the end-uses of Eastman cellulose esters, which may or may not have been processed by the Tennessee Eastman Corporation.

Q. Is the objective to create a demand for the product of the Tennessee Eastman Corporation?

A. Our first objective is to associate Eastman with esters of cellulose in addition to the film uses, in the minds of the public.

Mr. Proskauer: Can't we take a short-out to that? With your Honor's permission, may I ask, isn't what you mean, that you do this advertising work to develop a demand for those esters which are, in part, made by the Tennessee Eastman Company and in part made by the Eastman Kodak Company; do I state that correctly?

The Witness: That may be an incidental effect. Our object first is to give publicity for the uses to which these are put.

The Court: Whether they are made by the Tennessee Company or the Eastman Company or both?

The Witness: Yes. Of course, almost none of the end uses are made by the Eastman Kodak Company, that is the end products. Film is an end product made by the Eastman Kodak Company, but bayonet scabbards for the United States Army are not manufactured by the Eastman Kodak Company but represent a use of the cellulose esters—Eastman cellulose esters.

The Court: In other words, your primary purpose is to market the products of the Eastman Company which may be utilized by anybody in the manufacture of any [fol. 87] product of which it may form a part?

The Witness: To publicize that product.

Q. It is not publicity for publicity's sake, it is for sale?

The Court: Publicity for profit, if there is any.

The Witness: Presumably a profit to the Eastman Kodak Company to do this.

Q. Do you send out releases to newspapers all over the country?

A. Yes, sir.

Q. Do you have any way of stating the number of such releases that are put out by you in the course of a year?

A. Probably several a week, sent individually to 30 or 40 publications.

Q. Do you send them to newspapers or to magazines?

A. Both.

Q. Are newspapers included in these 30 or 40?

A. Yes, sir.

Q. Would that include the Associated Press or the major press services?

A. Yes, if the releases are to a syndicate, of course we cannot tell how many papers the final release may go to.

We send them mostly individually to the newspapers or magazines.

Q. Well, but you do send them to newspaper syndicates, is that right?

A. I cannot recall any instance at the moment, but there may have been.

Q. Do you utilize from time to time in these releases or orders, the products of the photographic studio on the 22nd floor that the previous witness testified concerning?

A. Yes.

Q. Do you use photographs in all of your releases?

A. No.

Q. Is there any proportion?

A. Most of them are photographic picture news releases.

Q. So that the pictures are—

A. A part of the release.

[fol. 88] Q. So that the pictures are most of the releases if not all, is that correct?

A. Yes.

Q. In addition to the picture, there is copy matter, is that correct?

A. Sometimes.

Q. And who makes up the copy?

A. The staff on the 40th floor.

Q. Under your direction?

A. Yes, sir.

Q. And that is made on the premises at 10 East 40th Street?

A. Yes, sir.

Mr. Proskauer: Your Honor, haven't we got the story? It seems to me needless repetition. There is no dispute about it.

The Court: Go ahead.

Q. Have you brought with you any clippings of products or releases sent out from the premises 10 East 40th Street?

A. Yes, sir.

Q. May I see it, please?

The Court: Mark it Plaintiffs' Exhibit 8 for Identification.

(Marked Plaintiffs' Exhibit 8 for Identification.)

Mr. Proskauer: Do you just want to offer one or two types or samples?

Mr. Herwitz: I would like to look at it first because I haven't seen it, Judge. I do not intend to offer all of them. It has not been offered in evidence but just for identification.

The Court: Mark this Plaintiffs' Exhibit 9 for Identification.

(Marked Plaintiffs' Exhibit 9 for Identification.)

Q. As to Plaintiffs' Exhibit 9 for Identification, which is a picture, can you tell us where that picture was made?

Mr. Proskauer: I will concede it was made on these premises at 10 East 40th Street.

[fol. 89] A. On the 22nd floor of 10 East 40th Street.

Q. Did you send that to any newspaper outside of New York State?

A. Probably.

Q. Or to any publication?

A. Yes.

Q. Will you state the number of such publications outside of New York State?

The Court: Tell us one by name outside of New York State.

The Witness: I would be unable to do so because I do not know where this picture was sent. It is typical of the releases that we send to different newspapers in different parts of the country. I do not have a record here of the routing of that picture.

Mr. Proskauer: Your Honor, I shall not question that these pictures and releases when taken and produced on those premises that he testified to, are sent over the country and outside the State of New York to newspapers and publications and used for publicity.

Mr. Herwitz: All right.

Q. And do you send these photographs or releases by mail outside of New York?

A. Yes, sir.

Q. What other forms of transportation do you use?

The Court: Do you send them by radio—radio-graphs?

The Witness: No, sir.

The Court: To go abroad.

The Witness: Some of them to South America by mail.

Q. Do you have a mimeographing machine on the premises?

A. No, sir.

Q. When you have to send a large number of copies, [fol. 90] releases, and so forth, do you make those copies up in the premises?

A. No.

Q. Where are they made up?

A. By a mimeographing service.

Q. Where is that, do you know?

A. In the City.

Q. Not at 10 East 40th Street?

A. No.

Q. Do you have anything to do with the A. M. Tenney Corporation?

A. The A. M. Tenney Associates are sales representatives for the Tennessee Corporation, a subsidiary of the Eastman Kodak Company.

Q. Do you have anything to do with them?

A. They tell us, when they find end uses of Eastman cellulose acetate yarn which we might wish to publicize.

Q. Are there other representatives of Tennessee Eastman Company that you receive similar advice from?

A. I cannot think of any at the moment.

Q. Is Mr. Searles connected with your company or do you have any business with him, I should say?

A. Mr. Searles is a sales representative for plastic products.

Q. Do you do any advertising or publicity work in connection with those products?

A. Yes, sir.

Q. And do you consult with Mr. Searles in connection with that?

A. Not to my recollection.

Q. Do you consult with any agents of the Tennessee Eastman Corporation outside of New York?

A. Yes.

By the Court:

Q. Where?

A. With their field representative—with their sales representative.

Q. At what point?

A. Chicago.

Q. Do you do that personally?

A. No, sir, but my staff have done so in the past.

Q. Do you maintain any offices in Chicago?

A. No, sir.

Q. Under your supervision?

A. No, sir.

[fol. 91] Q. Do these representatives under your supervision go from New York to Chicago for the purpose of having such meetings or conferences?

A. The contact I was having was by correspondence.

By Mr. Herwitz:

Q. Do you correspond regularly with offices outside of the State of New York?

A. No, sir. We rely on our own initiative mostly to find subjects for our publicity.

Q. Do you correspond somewhat?

A. Yes, sir.

Q. Sometimes?

A. Yes, sir.

Q. Do you keep in touch with the Tennessee Eastman Company of Kingsport, Tennessee?

A. Yes, sir.

Q. Frequently?

A. Irregularly.

Q. How often would you say on an average?

A. Once a month or once every two weeks.

Q. How is that contact maintained, by what means?

A. By correspondence.

Q. Is that all?

A. No, representatives of the Tennessee Eastman Corporation have visited our office.

Q. Was that in the line of their business?

A. Sometimes.

Q. Have you ever visited the factory at Tennessee?

A. Yes.

Q. Do you make fairly frequent visits?

A. I have not been there fore more than a year.

Q. Do members of your staff go there?

A. No, sir.

Q. Do members of your staff do any traveling at all?

A. Very rarely. One member has made trips to find products made of Eastman Kodak esters in various manufacturers' hands, such as the manufacturers of Army dive-bombers—make, not specified.

Q. Do you keep any records of the number of the newspapers and publications in which releases emanate from your office?

A. No very systematic record.

[fol. 92] Q. Do you keep any at all?

A. We have occasionally made up clipping books and sent them to Rochester. I can state in general what results were obtained. Most of the clipping books have never come back. I have an ancient one here showing somewhat the circulation achieved by picture releases back in 1940, I think.

Q. Where it says under one of the pictures—I will first have it marked for identification.

(Marked Plaintiffs' Exhibit 10 for Identification.)

Q. Where it says under one of these pictures the circulation of this Eastman Fashion News picture, 3/20/41, is 1,200,000; can you tell us what that meant?

A. That would mean that it probably appeared in about six newspapers to that date.

The Court: Having a circulation of that number?

The Witness: Having a total circulation of 1,200,000.

Q. Are you able to estimate for us the proportion of the newspapers or publications appearing in New York and appearing outside of New York?

A. The majority would be outside of New York City.

Q. How about New York State?

A. The majority would still be outside.

Q. What period is covered by Plaintiffs' Exhibit 10 for Identification?

Mr. Proskauer: Read it. If it is on there, I will take your word for it.

Mr. Herwitz: He knows it better than I do, and will be able to do it faster than I can, I hope.

The Witness: I cannot tell you; unfortunately there is no record of the date.

[fol. 93] Q. Do you have any idea? Does it cover a month or is it a matter of weeks or what?

The Court: For what year?

The Witness: Early 1941. One of them is marked as having been published on the 29th of January, 1941.

The Court: That is the first one.

The Witness: Further identified as a clipping from the Pittsburg, Pennsylvania, Post Gazette—no page number.

The Court: State what you know about this. I am just trying to get information.

The Witness: This book is simply a miscellaneous collection of pictures on which we happened to have circulation figures at that time. Some of the pictures may have been released a month before, this representing the cumulative circulation of them as of March 29, 1941. They do not represent all the pictures that were produced in any given period.

Q. Do you have any idea, any estimation or approximation of the annual number of newspapers or the circulation in the course of a year, just as you have made a note on the circulation for each of these pictures?

Mr. Proskauer: Your Honor, I am going to register an objection to that as irrelevant and utterly immaterial.

The Court: I think it is too speculative. The objection is sustained.

Q. Is what is represented by Plaintiffs' Exhibit 10 for Identification a fractional part of the work of any one year?

A. Yes, sir.

The Court: It must be. It is either a fractional part or the whole of it.

[fol. 94] Q. Is it a very small or minute part of the work of the whole year?

A. Yes, sir.

Mr. Herwitz: I offer it in evidence.

Mr. Proskauer: May I state the area of this space

on the 40th floor? It is 1,950 square feet or 8/10ths of 1 per cent. of the rentable space of the building.

Q. Is this book typical of the kind of book that you said you made up from time to time?

A. Yes, sir.

The Court: He said that before.

EUGENE J. EGAN, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Eugene J. Egan.

Q. And your address?

A. 156 Surrey Commons, Lynbrook, Long Island.

Q. Have you been subpoenaed, Mr. Egan?

A. Yes.

Q. Do you have your subpoena with you?

A. Yes.

Q. Will you state what company you are connected with?

A. Carl Byoir & Associates.

Q. Where is that company located?

A. 10 East 40th Street, 38th floor.

Q. Do you know how many floors of space are occupied by Carl Byoir & Associates?

A. One floor and part of another floor.

Mr. Herwitz: Have we got that, Mr. Levin?

Mr. Levin: 38th floor—4735 square feet; 3705-10 occupied by an associated company, Business Organ[fol, 95] zations, Inc.—3570 square feet; 2508—715 square feet.

Q. Do you know how many feet that is altogether?

A. 9020 square feet.

Q. Room 2508, is that correct?

A. That is right.

The Court: That is all included in the 9020 square feet.

Mr. Levin: According to Cross & Brown's record, that is the total area—subject to correction.

Q. What is your position in that company?

A. I am mail department supervisor.

Q. On what floor do you do your work?

A. The 37th floor.

Q. You have a mailing department there?

A. Yes.

Q. What is the area of that?

A. Well, it has three rooms. I don't know offhand the area.

The Court: How many people are employed in the mailing department?

The Witness: Six.

Q. Including yourself?

A. That is right.

Q. Are these male workers or female?

A. One is female.

Q. What do these men and this woman do, and what do you do?

A. They operate mimeograph machines, wrap, seal and stamp mail and they run errands.

Q. All right. As to the mailing department, will you give us some idea of the number of pieces—the average number of pieces of mail that is put out by your department, let us say in the course of the average week?

A. On the average we have one weekly service—I would say between 2500 and 3000.

[fol. 96] Q. Pieces of mail?

A. That is right. Now, you take the release of a thousand pieces of mimeograph work, the workers run them in my department, and the addressing lists are left in my department and they are bundled and sent to the mailing house to do the job of mailing.

Mr. Proskauer: Don't you think it would help the Judge if it is indicated that these people are engaged in public relations work?

The Court: I know what it is, but that doesn't do you any good on the record, unless you tell me. The record will show what he testified to.

Q. You say you do a job of mailing, just what do you mean by that?

A. That actually means the collating of the pieces. Two-thirds of the work has to be collated, sometimes stapled together, folded and put in envelopes and the envelopes are run through a machine, closed and stamped and they take the bulk over to the post office.

Q. Do you mean you take it to the mailing house?

A. We handle all kinds; when they consist of small ones up to 200, we handle those ourselves—I mean we mail them ourselves.

Q. You are speaking about releases; what type of releases do you refer to?

A. Press releases.

Q. Generally speaking, what is the business of Carl Byoir & Associates?

A. They are public relation counsel.

Q. Do you know whether these press releases that are put out by your department go to newspapers and publications all over the country?

A. They do.

Q. Do you have any figure or can you give me any estimate of the proportion of the mail going out of your department that goes to addresses in New York State and the proportion going out of New York State?

A. That depends on the release. We have a complete New York State daily and weekly newspaper list and some [fol. 97] of the releases may go to the complete New York State list; others will cover part of the State. It all depends on the release itself.

Q. On the overall picture, is there any proportion that you can estimate of the number or total pieces of mail of all releases which go out of your department—can you tell us the proportion that go to addresses in New York State and to addresses outside of New York State?

A. I would say 90 per cent go outside of New York State; we have special releases also that cover the New York dailies.

Q. You have estimated a figure of 2500 to 3000 a week.

A. That is just an estimate. Some weeks we will have less and sometimes more, that is determined by the routing clerk.

Q. What is included in this estimate of 2500 or 3000? Does that consist of items of mailing releases or anything going out of your department?

A. That is the mailing list.

Q. Is there anything else that goes out of your department?

A. Once in a while we have a package to go out, packages of pictures, different packages, whatever happens to be in the organization. For instance, if they want to send a scrapbook downtown, one of the boys would take the scrapbook from the clipping department and take it there.

The Court: What counsel wants to know is if there are such packages that go out of your office by mail or express that go out of the State of New York.

The Witness: Yes, there are.

Q. What are those packages?

A. They may be releases to send to our Chicago office to be distributed from the Chicago branch.

Q. Is that a frequent occurrence?

A. I would say yes.

Q. Can you give us an idea of the frequency of such occurrences?

A. About once a week.

[fol. 98] Q. What is contained in such packages? Can you give us any idea of the nature and character of these packages?

A. Every package varies. One package may have 200 prints; another package may have a 3-page release; that varies; they are of all sizes and shapes. They cannot all be carried by a boy to the express office or the post office.

Q. How many stacks of mail go out of your department in the course of a week?

A. We very rarely have a complete stack of mail. Our boys, when they have a release of 500 packages, that is taken to the post office as soon as it is finished in the department. Any bundle that can be made up in that way, it is sent to the post office in that way, but once in a while we have four or five bundles, in which case they put in a sack, and they go to the post office in a sack.

Q. Do you have more than one sack go out of the office in any one day?

A. Once in a while, but very rarely.

Q. How many mimeograph machines do you have in your department?

A. Two.

Q. Have you produced a scrapbook?

A. Yes, I have a scrapbook, also a few copies of releases to show you what the releases are about, and a few copies of our weekly features that we send out.

Q. All right, will you open the package and let me see that, please?

The Court: The scrapbook will be marked Plaintiffs' Exhibit 12 for Identification. Do you want to make a statement on the record what it shows according to your view?

Mr. Proskauer: I will have no objection.

(Marked Plaintiffs' Exhibit 12 for Identification.)

Q. Will you tell the Court what this scrapbook is?

The Court: What do you mean by that? If the scrapbook is offered in evidence, that will be the best evidence of what it contains.

[fol. 99] Mr. Herwitz: I offer the scrapbook in evidence then.

The Court: Show it to your opponent.

Mr. Proskauer: I thought it had already been marked.

The Court: No, it was marked for identification and now he is offering it in evidence.

Mr. Proskauer: No objection.

The Court: All right, received.

(Plaintiffs' Exhibit 12 for Identification received in evidence.)

Q. I show you the first page of Plaintiffs' Exhibit 12 and ask you to look at one of these pictures appearing herein, apparently a clipping from a newspaper, is that correct?

A. That is right.

The Court: Do all the articles which appear in that exhibit—in the pages of this book, represent the activities of your firm?

The Witness: Yes, they do.

Q. Are these pictures or releases issued by your firm which appeared in various newspapers throughout the country?

A. Yes, they are.

Q. Is that exactly what all these clippings are?

A. That is what they are.

Q. Do those emanate in the first instance from your department?

A. Some did and some did not.

The Court: I would not assume that they emanated from his department because his department is a mailing department. They have to get it in some shape before they get it in the mailing department for distribution.

Mr. Herwitz: That is correct. I merely addressed [fol. 100] the question to you, Mr. Egan, with respect to your department.

The Court: I have already brought out that everything in this book pertains to the business of his company. This witness testified whatever is sent out from the mailing department passes under his supervision. Doesn't that, together with an inspection of the book, tell the story?

Mr. Herwitz: I think it does pretty well, your Honor.

Mr. Proskauer: Particularly when there is no dispute about it.

Q. The scrapbook which has been marked Plaintiffs' Exhibit 12, is that also typical for a particular period?

A. That is right.

Q. Do you know what period this covers?

The Court: Doesn't it show?

A. The dates are on the newspaper clippings.

Mr. Herwitz: All right, I see. That is all.

Cross-examination.

By Mr. Proskauer:

Q. You don't sell anything?

A. No.

The Court: They sell service.

Mr. Proskauer: That is all.

[fol. 101] STUART K. BRANDON, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Stuart K. Brandon.

Q. What- do you reside?

A. 420 Riverside Drive, New York City.

Q. Mr. Brandon, you are the attorney for the Carl Byoir & Associates?

A. I am general counsel for Carl Byoir & Associates and president of the business association which handles the Atlantic & Pacific account, as public relations counsel.

Q. As general counsel, do you do your work at 10 East 40th Street?

A. I do, sir.

Q. Are you familiar with the general operations of the business of Carl Byoir & Associates and related companies?

A. Yes, sir.

Q. Will you state the nature of the business and how it is carried on?

A. Well, it is a personal service, in that we consult with clients as to their public policies and their publicized activities. That includes a multitude of names and includes conferences with the various directors and heads of the board and includes having specialists in various matters such as one man will be a specialist on merchandising, another man will specialize, for instance, at this time on ceiling prices, on the rules and regulations on that, and we have writers of various sorts, such as feature writers—former newspaper men who are familiar with what is usually taken by papers on public questions, and we have a photograph department and we have writers for magazine articles and also feature articles such as these stories that are written in newspapers and magazine sections of the newspapers and we have an accounting department, a clipping bureau which keeps track of the various clippings or releases, and where they are printed, and so forth, and they are put in books of that sort—

[fol. 102] The Court: Referring to Exhibit 12.

A. (Continuing): Referring to Exhibit 12. I can hardly tell you how many we have in the photographic department. In other words we have specialists in everything pertaining to business. We have specialists that handle all of these things, except we do not handle the preparation of advertising matter. We sometimes, when occasion requires, approve of it and look over it, but we are not what is known in the trade as an advertising concern. That is about all I can tell, unless there is something else you would like to ask me.

Q. Do you have clients located all over the country?

A. We do. We have clients—I can tell you some of them: We represent the Aluminum Company of America; we represent the Atlantic & Pacific Tea Company; we represent Libby-Owens Company; the Pullman Company, the Willys-Overland and numerous others as public relation counsel only.

Q. How many offices does the Carl Byoir & Associates have?

A. We have an office in New York; we have a substantial office in Chicago; a substantial office in Washington. We have smaller offices—we call them an office—that is, we have representatives on the ground all the time in those offices such as Detroit, Toledo, California—that is, Los Angeles; that is about where our offices are.

Q. It certainly would be a true statement to say that you carry on a large business on a national scale?

A. That would be a conclusion. All I can tell you is that we carry on our business in such a way that when there is something to be done in one of these other offices, a release, for instance, they must have the approval of the New York office. They must be sent in or telephoned as to what the contents are and the specific man who is charged with that particular account in the office, the main executive most probably, handles the matter here in New York; in [fol. 103] other words, it is all controlled and centered in New York. We have correspondence with our various offices—

Q. Do I understand then there are frequent telephonic communications between your representatives all over the country and your New York office?

A. That is right.

Q. That would also include such communications between yourselves and your clients all over the country?

A. Yes.

Q. And the communication takes place by means of telephone, telegraph, mail and all manner of communication?

A. That is right.

Q. I suppose there is travel back and forth by the various representatives of the New York office, is that correct?

The Court: And other offices.

Q. (Continued): And other offices?

A. That is correct.

Q. The premises at 10 East 40th Street is the hub of all the other offices?

A. The controlling organization for the other offices.

Q. Do you use other mediums for your work besides newspapers?

A. Yes; we use radio, we use magazines and we quite often use exhibits of various sorts. That is, where clients want to make a special show, as for instance, Marshall, Field & Company had a large exhibit which was under the supervision of our office in Chicago. In Chicago it was under the supervision of our organization. The Atlantic & Pacific Tea Company were giving some big display and we arranged the details of that display.

Q. Are releases prepared in the office of Carl Byoir & Associates at 10 East 40th Street?

A. Well, some of them. As I say, some are prepared in our branch offices; and approved by us.

By the Court:

Q. Take for example the display by Marshall, Field & Company in Chicago, was any part of that submitted to [fol. 104] the New York office?

A. All of it. A New York executive would take charge of it and go out there and see in a display of that sort that everything runs smoothly.

By Mr. Herwitz:

Q. But the actual making of the releases—

A. Are made in New York City.

Q. Can you give us any estimate of the number of the releases prepared in the course of a year at the office 10 East 40th Street?

A. That is impossible.

Mr. Proskauer: I will concede it is a very large number.

The Court: I think it already appears that as far as New York City is concerned from the preceding witness, who has charge of the mail distribution department, and this testimony would only be corroborative.

Q. And do you have any idea or any estimate of the number of newspapers throughout the country which in the course of the year, let us say, are circularized or to whom releases are sent by your company?

A. I would say approximately 17,000.

Q. Do you have any idea of the circularization of these various newspapers?

A. No, I have not.

Q. It runs, of course, into many millions?

A. There are a great many metropolitan papers, and a great many small papers, such as farm papers—various papers—that have special interests, such as agriculture, and so forth, and there are different lists that apply to each one.

Q. All these lists which emanate from 10 East 40th Street frequently appear in newspapers throughout the country?

A. Verbatim, oh, yes.

[fol. 105] By the Court:

Q. You send out boiler plates, don't you?

A. To use your expression, sometimes that is cut down; sometimes it is sent out just as we get it.

By Mr. Herwitz:

Q. So in newspapers throughout the country there is an exact reproduction of what has been created at 10 East 40th Street?

A. In some instances.

Mr. Proskauer: Boiler plate is a mat; they don't do that.

The Witness: We send out photographic mats.

Q. Do you have a photographic department at 10 East 40th Street?

A. We do.

Q. How many men work in that department?

A. Two.

Q. Do you know the type of equipment that they have there?

A. Well, all the equipment that is necessary to photograph and develop.

Q. Would that include cameras, klieg lights, and so forth and developing rooms?

A. Yes.

Q. Do you know on the average how many prints are put out by that department in the course of a week or a year?

A. I think Mr. Egan could tell you that better than I could. It would be a guess on my part.

Mr. Proskauer: If you care to ask him informally, I will consent.

Mr. Egan: About 200 on an average; they vary from week to week. I would say it would be an average of 200 a week.

Q. And these prints are sent out sometimes alone and sometimes together with releases, I assume?

A. When you say "prints," we send out mats instead [fol. 106] of plates on which the photograph was taken. We send out mats, then we send releases with them, sometimes shipped separately, sometimes together.

Q. And that of course goes to points all over the country outside of New York State?

A. Yes.

Q. Mr. Brandon, on your examination, page 3 of our book, you were asked this question: "Q. Do you know how many mimeograph machines you may have? A. I know we mimeograph between 15,000 and 20,000 sheets a week legal cap size."

A. That is correct. In other words, the release may contain anywhere from one to four or five sheets.

Q. In other words, when I asked Mr. Egan how many pieces and he said between 2500 and 3000—

A. He referred to the actual number of mailing envelopes, but the release may have one sheet in it or may have four sheets in it.

Q. Those 15,000 or 20,000 sheets a week are prepared, as Mr. Egan testified, and mailed from the premises 10 East 40th Street, is that right?

A. No, I did not say that are mailed from the premises. Those sheets are mimeographed in this office and then a great many times they are then sent down to the mailing house. If it is a big release, they assemble them and then mail them.

Q. It goes without saying, of course, that these sheets go up and down elevators in the building?

A. Yes.

Q. How many copy writers are employed and work at 10 East 40th Street?

A. You mean by copy writers, the people who write the stories?

Q. Yes.

A. I cannot give you that accurately. I should say a minimum of 20—15 to 20 as an average.

Q. Does that include men who do work for newspapers and magazines and all types of publication?

A. Yes.

Q. Does that include radio scripts?

A. Yes.

Q. Are any recordings made for radio scripts prepared at 10 East 40th Street?

A. At 10 East 40th Street they prepare the script and [fol. 107] then that script is taken outside of our office in New York City where the actual master record is prepared and after approval by us of the master record, we send them again to an organization which fixes the other records for distribution and those records are mailed out under our instructions to approximately 100 to 150 radio stations.

Q. Throughout the country?

A. Throughout the country.

Q. Have you brought any copies of such radio scripts?

Mr. Proskauer: Your Honor, I object to that as irrelevant. What is the difference what is in the radio script?

The Court: He hasn't got to that point yet. He just wants to elicit whether this witness has brought any here. I will let him answer that question yes or no.

A. May I offer the record ask Mr. Eagan if he brought them this morning? Do you have them; did you bring them?

Mr. Eagan: Yes, I have one radio script here.

Mr. Herwitz: May I just inquire of the witness whether this script went on the air.

The Court: If he knows.

The Witness: Yes, it did.

Mr. Proskauer: I will concede that either that script or some of the scripts have gone on the air.

Q. What is the business of Business Organization?

A. They are public counsel and handle exclusively that specific account of the Atlantic & Pacific Tea Company.

Q. Do they occupy specific space in the building?

A. Yes; they occupy the greater part of the 37th floor. In fact, they occupy it all except the part where the mail is [fol. 108] located. I don't mean to give the impression that we occupy the entire 37th floor. We occupy only about three-quarters of it.

By the Court:

Q. Except for the mailing part, Business Organization occupies all the remainder of the floor which Byoir Associates leases?

A. That is correct.

By Mr. Herwitz:

Q. This business of Business Organization is carried on in the same way as the Carl Byoir organization which you described, except that it refers specifically and exclusively to the A. & P. account?

A. That is right.

The Court: I would say this was a subdivision of the business for the purpose of segregating the activities of the business of A. & P.

The Witness: As a matter of fact, I am general counsel of A. & P.; they have contractual relations with Carl Byoir Associates.

Q. Does Carl Byoir Associates have on the list of its clients any number of firms engaged in production for interstate commerce at 10 East 40th Street?

A. That is a conclusion again. I will tell you what the firms are, such as Willys-Overland—

Mr. Herwitz: Will you stipulate that?

Mr. Proskauer: I will concede that there are customers engaged in production of goods in interstate commerce other than at 10 East 40th Street.

Mr. Herwitz: We have it in the record that the space 2508 is also occupied by you?

[fol. 109] The Witness: Yes.

Q. Will you state what is in space 2508?

A. Our accounting department.

RALPH FOOTE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Ralph Foote.

Q. Where do you reside?

A. 325 East 41st Street.

Q. What business are you in, Mr. Foote?

A. I am associated with the Beech-Nut Packing Company.

Q. What is the nature of your business?

A. We manufacture food products and confections.

Q. Where is your factory?

A. Canajoharie, New York, Rochester, Brooklyn.

Q. Are they articles of merchandise which go into interstate commerce?

Mr. Herowitz. Will you concede that, Judge?

Mr. Proskauer: I will concede that the articles of merchandise made in those places, not at 10 East 40th Street, go into interstate commerce.

Mr. Herwitz: If that is all—

The Court: Just a moment. Let us put it this way: that the products manufactured by the Beech-Nut Company at Canajoharie, Rochester and Brooklyn are manufactured and in some instances go into interstate

commerce, but that the company does not manufacture anything at 10 East 40th Street.

Mr. Herwitz: I am not stipulating that the company does not manufacture anything at 10 East 40th Street.

[fol. 110]. The Court: That is the defendant's concession.

Q. What is your position with the company?

A. I am advertising manager.

Q. Will you describe your functions and the work that takes place at your office under your direction?

The Court: Just a moment. You haven't shown yet that his office is located at 10 East 40th Street.

Mr. Herwitz: You will stipulate that he has an office at 10 East 40th Street?

Mr. Proskauer: I will stipulate that they have an office at 10 East 40th Street, Suite 3101, and the area is 2,690 square feet. I understand we both stipulate that.

Q. Will you tell us what goes on at those premises?

A. I have general charge of the advertising of the company and, naturally I handle the advertising campaigns for our various products.

Q. How many employees are these under your supervision at the office?

A. At that office two. My department is in Canajoharie, and I have two stenographers there.

Q. At Canajoharie?

The Court: No, at 10 East 40th Street, but the remainder of his employees under his supervision are at Canajoharie.

Q. Is any creative work done by you at 10 East 40th Street?

A. Naturally in my position I am creating things all the time.

Q. Will you tell us what you are creating?

A. Advertising.

Q. What does that mean, that you create copy?

A. No, I do not do any writing, but I have ideas which I [fol. 111] turn over to our advertising agency and tell them to get it up. I don't do any writing myself.

Q. Who is your advertising agency?

A. Newell Emmett Company.

Q. Where are they located?

A. 40 East 34th Street, New York.

Q. Is your advertising done on a national scale?

A. In the confection division, yes; in food products, no.

Q. Is the confection business a substantial amount of your business?

A. Yes.

By the Court:

Q. What is the name of your advertising agency?

A. Newell Emmett Company.

Q. That is a regular advertising agency?

A. Yes, sir.

By Mr. Herwitz:

Q. Do representatives of the advertising agency come to your office and show you copy that they have prepared?

A. Yes.

Q. And that must be approved by you before it is sent out?

A. It is approved by several people of the company. If it is sent to Canajoharie, to the general manager of the confection division, it goes to one or two of our vice-presidents and directors. Sometimes however it is sent to Syracuse—

Q. Is it approved by you?

A. Yes.

Q. Do representatives of the advertising office come to your office at 10 East 40th Street and submit this copy to you?

A. Yes.

By the Court:

Q. When this copy is submitted to you, do you then send it to Canajoharie?

A. Yes.

[fol. 112] Q. Does it then come to you for approval?

A. It comes to me with any suggestions that I might offer to the Canajoharie people; but as a rule it is sent to the advertising agency and I go down there and listen to what

suggestions they have to make. We got back and forth constantly.

Q. Who has the last word on it?

A. I have.

By Mr. Herwitz:

Q. Do you from time to time make changes in the script or the copy?

A. Oh, yes.

Q. And do you make those changes at the premises 10 East 40th Street?

A. Yes.

Q. Are there, in addition to copy, pictures used in this advertising?

A. Yes.

Q. Where are those pictures made?

A. They are made through the advertising agency—through various artists. I have no idea who makes them.

Q. Do you have anything to do with that?

A. Nothing at all.

Q. Is there an executive office also at 10 East 40th Street?

A. Yes.

Q. Who occupies those offices?

A. The president of the company, also the sales manager of the food division.

Q. Do you know whether or not the president of the company is in constant communication with the office at Canajoharie?

A. We have a direct wire there, yes.

Q. A direct telephone wire?

A. Yes.

Q. Do you know whether problems of production are discussed over the wire?

A. I would assume so, but I have no personal knowledge.

By the Court:

Q. Is this executive office at 10 East 40th Street that you speak of in the suite No. 3101?

A. Yes.

[fol. 113] By Mr. Herwitz:

Q. You, of course, have nothing directly to do with production?

A. Nothing at all.

Q. Is there a sales office where the salesmen make their headquarters at 10 East 40th Street?

A. Only the general manager of sales of the food division.

Q. What is his name?

A. Hoover.

Q. Do you know whether he has anything to do with sales outside of New York State?

A. Oh, yes, certainly; he has things to do with sales throughout the food division field of operations.

Mr. Proskauer: I understand that the salesmen themselves are not in the place.

Q. Is that right; the salesmen themselves are not at the office?

A. No.

Mr. Proskauer: They have another place in New York.

Q. Do the salesmen come up to the headquarters at 10 East 40th Street?

A. Oh, yes, occasionally for personal or social calls.

Q. I don't mean that. Do they come there for business?

A. No, not for business.

Q. Is there any direct wire between the sales office in New York and your office?

A. I believe so, but I don't know. If I want to get the 19th Street office, I just ask for it.

By the Court:

Q. You mean over the telephone?

A. Yes.

[fol. 114] By Mr. Proskauer:

Q. The 19th Street office is where the salesmen are?

A. Yes, that is where the salesmen make their office, in this division.

By Mr. Herwitz:

Q. Do you in the course of your activities have any telephone communication with any points outside New York City?

A. Yes, certainly.

Q. With whom?

A. With operators of radio stations, newspaper publishers and maybe some of our own division managers, if I may be visiting their territory.

Q. Do you have advertising divisional managers throughout the country?

A. No.

Q. But the sales department does?

A. Yes.

Q. The advertising department works closely with the sales department, does it?

A. Oh, yes.

Q. Are there any pictures taken at the premises 10 East 40th Street by any employee of the Beech-Nut Packing Company?

A. There is a boy on the seventh floor who is accustomed to take pictures of products, manufacturing processes, labels and so on. Those pictures are not for any display to the general public. They are for our own use, as a matter of record.

By the Court:

Q. Who occupies this office on the seventh floor where this young man is?

A. Only Ed. Boone, who is the picture man.

Q. Is that an office which is rented by the Beech-Nut Company?

A. I believe it is, yes. I believe we pay the rent for it.

The Court: What is the area in that, Mr. Levin?

[fol. 115] Mr. Levin: We will supply the area of that. I forgot that completely. It is just a small room, isn't it?

The Witness: It is a small room, yes.

By Mr. Herwitz:

Q. Do you have any mimeographing machines?

A. No.

Q. Connected with your company?

A. I imagine there may be in Canajoharie, but there are none in New York.

Q. Is there any teletype machine?

A. Yes, there is a teletype machine.

Q. Between the New York office and the Canajoharie plant?

A. I imagine the teletype machine can get any teletype number anywhere in the United States. I don't know, but I think so.

Q. Is there anything up at Canajoharie except the actual factory?

A. Oh, yes, that is where our general offices are.

Q. Is 10 East 40th Street a branch office or the headquarters?

A. It is merely an accommodation office. As a matter of fact, the office was opened up for my benefit when I became advertising manager of the company—as a matter of accommodation to me. Most of our dealings are with publishers and representatives of radio stations in New York, so it is a lot easier for me to live in New York than it is in Canajoharie, to conduct my part of the business.

Mr. Herwitz: You will concede, Judge Proskauer, that the advertising that goes out of this department or which results from the efforts of this man, goes to newspapers and publications throughout the country in a very substantial amount, won't you?

Mr. Proskauer: Surely.

[fol. 116] Q. Now, Mr. Foote, is there anything else that you can tell us about the activities going on at 10 East 40th Street that you have not been asked about?

A. That is virtually all that goes on. They are just a few separate offices.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. Does the president of the company live at Canajoharie?

A. No, no, he lives in Englewood, New Jersey.

Q. Is there an office in Canajoharie as well as here?

A. Yes, he has a place that he makes his headquarters there.

By the Court:

Q. The office that you have described is the one that he uses when he is in New York?

A. Yes.

By Mr. Proskauer:

Q. As I understand it, there isn't any processing or selling or finishing of any merchandise done at these premises, 10 East 40th Street?

A. No direct selling, no.

Q. And there is no manufacturing of any kind, is there?

A. None at all.

Q. And no processing or finishing?

A. No.

GEORGE E. HATCH, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. George E. Hatch.

Q. And your address?

A. 10 East 40th Street.

[fol. 117] By the Court:

Q. What number is your office there?

A. 2905.

Mr. Levin: 875 square feet, your Honor.

By Mr. Herwitz:

Q. What business are you in, Mr. Hatch?

A. Advertising agency.

Q. Will you describe the activities that take place on the premises at 10 East 40th Street?

A. Well, we prepare plans for the advertising for our clients. That means writing copy, ordering layouts, ordering engravings, and placing the advertising.

By the Court:

Q. Do you have any mimeographing machines?

A. None at all.

Q. Do you have any cameras?

A. No.

By Mr. Herwitz:

Q. Do you represent clients doing interstate commerce business?

A. Yes.

Q. Would you have any objection to naming these clients?

A. No, not at all. One is the Laminated Shim Company.

The Court: You mean out of state clients?

The Witness: I think that is the only client we have where their contacts are out of the state. There are sales departments where their executive offices are in New York State.

[fol. 118] By the Court:

Q. Do you keep in touch with this concern?

A. That particular client perhaps once a month.

Q. What percentage of your business do you have with this client as compared with your total business?

A. Perhaps 10 per cent. I think that is about right.

By Mr. Herwitz:

Q. For the clients that you do business with, local business, your advertising includes advertising of a national character?

A. Oh, yes.

Q. Would you name some of those clients and the type of advertising you do for them?

A. Our advertising is altogether industrial advertising, consisting of direct mail work, catalogue work and so on. Among these clients are the American Meter Company, Neptune Meter Company, Bijur Lubricating Corporation; Victor Bahea Textile Company. That is about the extent of it.

Q. Are these clients engaged in production?

A. They are all manufacturers.

By the Court:

Q. Do they manufacture in New York or elsewhere, if you know?

A. Neptune manufactures in Long Island City, your Honor; that is New York.

Q. That is right. I am speaking of New York State.

A. Victor Bahea manufactures in Pennsylvania; the American Meter Company manufactures not only in New York State, but they have plants in Pennsylvania and really throughout the country—a half dozen different plants.

By Mr. Herwitz:

Q. And do you know whether all these companies that manufacture, whether in New York or out of New York [fol. 119] manufacture in interstate commerce, that is, sell their products over state lines?

A. They sell throughout the country, yes.

Q. You spoke of direct mail advertising, is that right?

A. That is right.

Q. Do you prepare the letters?

A. We write the letter, but we do not produce the letter.

Q. But you write the letter?

A. Yes.

Q. At 10 East 40th Street?

A. That is right.

Q. After you write the letter, what happens to it?

A. We, in the name of our clients, order the processing of the letter. Incidentally, when I say in the name of the client, the billing is done actually to the client and not to us. We are merely the agent of the client.

Q. You mean you call the printer who prints it or mimeographs?

A. Yes.

Q. Do you make those arrangements at your office?

A. Generally, yes. At least the order is issued from our office.

Q. When these letters are sent to the printer, do you say, you get a copy back, do you not?

By the Court:

Q. Now, is it the printer or the other person to whom you give this letter for the purpose of having it reproduced who is located in New York?

A. Almost always, yes.

By Mr. Herwitz:

Q. And do you approve the proof which comes back from the printer?

A. Yes.

Q. And do you from time to time make corrections on that proof?

A. Yes.

Q. And that goes back to you after the final proof?

A. Yes.

[fol. 120] By the Court:

Q. Then after the product has been made by the printer or mimeograph company, or whoever does it, does it come back to you for distribution, or does it go some other place?

A. No, it is delivered to our client.

By Mr. Herwitz:

Q. He then distributes it?

A. That is right.

Q. Do you know whether these direct-mail campaigns go all over the country?

A. Yes, they do.

Q. Is there drawing work or art work done at your premises?

A. No, none at all.

Q. Any illustrations of any kind?

A. No.

By the Court:

Q. Where do you get any of the photographs that you use?

A. Sometimes they are supplied by the client and sometimes we order it. We do none of that ourselves.

By Mr. Herwitz:

Q. When they supply these photographs, do you ever get them from out of the state mailed to your office?

A. Occasionally, yes.

Q. Can you give us some estimate—I don't want to probe into your business, but can you give us an estimate of the approximate volume of the business that you do?

A. Are you speaking of the total amount of money spent or of our own commissions received?

Q. Suppose you give us both in a gross, general, figure.

The Court: What is the necessity of putting in the record what their commissions amount to? We are concerned with the volume of business.

[fol. 121] —Mr. Harwitz: I think that is so. And I will confine it to that.

Mr. Proskauer: I don't quite know what the witness is being asked. Is it the total amount? Suppose they get out a form letter and send it to a client and the client sends it out? How do you estimate that in money—I don't know what that means.

The Court: I don't either.

Q. Let me put it to you this way: You have placed advertisements or run advertising campaigns for your various customers, have you not?

A. Yes.

Q. Can you give us a figure—an approximate figure—of the cost of the advertising that you have placed for your customers in the course of a year?

By the Court:

Q. Do you place all the advertising, or does the customer sometimes place it?

A. We just take insertion orders for our clients.

Q. Can you give us any idea what the volume is in dollars and cents?

A. Something like \$125,000 a year, but that is a very rough estimate.

By Mr. Herwitz:

Q. Does that include the cost of the materials used in your advertising?

A. Do you mean materials we use, such as the cost of paper? The cost of paper, and so on?

The Court: I understood he referred to newspaper advertisement.

The Witness: It is not newspaper, it is industrial advertising.

The Court: I understood \$125,000 represented the cost to his client.

[fol. 122] The Witness: That is correct.

The Court: Of the advertising, no matter where it had been done.

By Mr. Herwitz:

Q. Does that include everything?

A. That includes engraving, printing and includes publication and so forth.

Q. Would you say a substantial portion of that goes in interstate commerce?

Mr. Proskauer: I object to that.

The Court: I will sustain the objection.

Mr. Proskauer: I will stipulate that a substantial portion is printed in newspapers outside the State of New York, and a substantial portion of these letters that he described goes to customers or persons outside of the State.

The Court: He has already testified that a substantial amount of the product advertised moves in interstate commerce.

E. KELLY DOWNEY, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. E. Kelly Downey.

Q. And your address?

A. Mamaroneck, New York.

Q. Where are you located in business, Mr. Downey?

A. At 10 East 40th Street, suite 4202.

Mr. Proskauer: The area of that is 260 square feet.

The Witness: I just got the subpoena at ten minutes to twelve, and I came right over.

[fol. 123] Q. What business are you in, Mr. Downey?

A. Wholesale coal.

Q. What is the name of your firm?

A. E. Kelly Downey. The subpoena counsel refers to is to Red Jacket Coal Sales, which is the name on the door, as well as my name, but they are only one of several companies whose coal I sell. I am the tenant.

By the Court:

Q. Where does Red Jacket Coal come from?

A. West Virginia and Virginia.

By Mr. Herwitz:

Q. Will you describe the activities of your concern located at 10 East 40th Street.

A. I sell coal here at wholesale for shipment in railroad cars from the mines to people who buy here, and that is delivered in many states. There is no storage of it, nor any stock kept here, like a dock or anything of that kind.

Q. What area do you sell in—in what area do you operate?

A. I operate here—

By the Court:

Q. He means within what part of the United States do you confine your sales?

A. New York, Connecticut, New Jersey and Massachusetts.

Q. Does your work oblige you to go out of your office or do your customers come to the office?

A. We go out 99 per cent of the time.

Q. How many salesmen do you have?

A. None. I am the only seller.

The Court: You can simplify this, and I suppose it will be conceded that the coal that is sold [fol. 124] originates in the state where the mine is located, crosses state lines to the point of delivery, wherever that may be, and that the sales are effected Street—

Mr. Proskauer: Surely.

The Court: And there are other activities which he carries on outside of that office, and he gets his commission from the seller for whom he sells.

The Witness: Correct.

By the Court:

Q. You pay your own office expenses?

A. Yes.

Mr. Proskauer: We will stipulate all that.

Mr. Herwitz: I will accept that, and I would like a few additional facts, if I can get them.

By Mr. Herwitz:

Q. Do you use a telephone at your premises at 10 East 40th Street?

A. Yes, I do.

Q. Do you use it in connection with this work which has just been described?

A. Correct.

Q. Do you use any other type of communication?

A. The teletype machine or teletypewriter.

Q. With whom do you communicate by means of that machine?

A. The different coal mining companies for whom I sell and to the customers.

By the Court:

Q. In order to contact customers you get in touch with them in New York City?

A. Yes, sir.

Q. Or do you reach some of them over the telephone outside of New York City?

A. Yes.

Q. Also by mail in New York City?

A. Yes.

[fol. 125] By Mr. Herwitz:

Q. Would you also say outside of New York State?

A. Yes, sir.

Mr. Proskauer: I concede all that.

The Court: I merely wanted to satisfy myself that he did not simply represent dealers in coal in other states, as far as he was concerned he made his contracts in New York City.

The Witness: I visit other cities as well as this City and State.

Q. How many employees do you have in your office?

A. One stenographer.

Q. Would you give us roughly an estimate of the amount of sales made by you, as you have described, in the course of a year, in money?

A. Money would be difficult. Tons is easier.

Q. All right, let us have it in tons.

A. 500,000 tons per year.

Q. What is the average price per ton?

A. \$2.75, but that may be 10 or 20 cents off.

Q. That is the cost at the mine?

A. Yes, sir.

Q. What is the custom as far as the payment of the freight is concerned. Is that paid by the buyer or seller?

A. The buyer usually, except for export business we pre-pay the freight to the shipping port, like Norfolk, Virginia.

Q. Do you send shipping instructions to the mine?

Mr. Proskauer: I object to that as irrelevant.

The Witness: I do.

Q. I asked you whether mining companies confirm the orders to you or to your customers directly?

A. To the customers, and the remittances are made to the home office.

[fol. 126] EUGENE CHARLES MCCARTHY, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Eugene Charles McCarthy.

Q. And your address?

A. 21 Gilbert Place, White Plains.

Q. What business are you in, Mr. McCarthy?

A. I am branch manager of the Thomas A. Edison Company.

Q. Where is that branch located?

A. 10 East 40th Street.

Q. What space do you occupy?

A. We have an office and sales space on the 25th floor and service space on the 7th floor.

Mr. Levin: I have the combined square footage of that which is 2300 square feet in Room 710, and 2500 square feet on the 25th floor, a total of 4800 square feet.

The Witness: We moved last fall from the 13th floor to the 25th. We sublet the 13th floor to Foley Bros. and we are still under lease for Foley Bros. Your figures are for the 25th floor and the 7th floor. That has been our space since October.

The Court: Suppose we take that subject to correction.

Mr. Levin: That would be a total of 4800 square feet for the two offices.

Q. And that occupies what space?

A. As I recall, we have about 2500 square feet on the 25th floor and 2300 square feet on the 7th floor.

Q. I did ask you where the plant has its main office.

A. Yes; West Orange, New Jersey.

[fol. 127] Q. Will you state the nature of the business done by the Ediphone Company at 10 East 40th Street?

Mr. Proskauer: You mean his division?

Mr. Herwitz: Yes; I said the Ediphone Company.

A. We received machines from our West Orange factory—various types of dictating instruments. We test those instruments in our service department, and we install them in offices in New York and the area around New York City.

By the Court:

Q. Where are the sales made from?

A. From the 7th floor office.

By Mr. Herwitz:

Q. And are they requisitioned from the factory in New Jersey?

A. Our requisitions are from the factory in New Jersey.

Q. Are they requisitioned pursuant to orders?

A. That is right.

Q. To fulfill orders in New York City?

A. Yes; I have order blanks here.

Q. Yes. I would like to see a sample of such order blanks.

Mr. Proskauer: Instead of putting it in evidence, why not state on the record what it is?

A. This is the sort of requisition we use on ordinary material. We indicate the type of the machine by the model.

Q. These are requisitions sent over to the Jersey plant [fol. 128] pursuant to which they send machines to the premises at 10 East 40th Street, is that correct?

A. That is correct.

(Marked Plaintiffs' Exhibit 15 for Identification.)

Q. How many machines on the average would you say in the course of a month are sent over from Jersey to New York at 10 East 40th Street?

A. In answering your question, I suppose you would like to take what might be considered a normal period?

Q. Yes.

A. About 250 a month, that is completed machines.

Q. Are there parts of machines which come over from New Jersey?

The Court: Replacements?

A. Yes; we handle them in the same way. We order parts in that same sort of book.

Q. Can you give us any idea of the number of such parts passing back and forth between New York and New Jersey?

A. Well, they run up into high figures, because we are constantly getting some parts every day, on machines in New York City, and they might run into hundreds of thousands every month.

By the Court:

Q. You mean machines in the hands of your customers?

A. That is right.

By Mr. Herwitz:

Q. They might be small parts or large parts?

A. That is right.

Q. When these machines come over from Jersey or the parts and so forth, they come to the building over the elevators into your suite, is that it?

A. That is right.

[fol. 129] Q. And when they go out, they go out in the reverse order?

A. Yes.

Q. What is the average value, the sales value, of one of those machines?

A. I would say an average of \$215.

Q. And could you give us any idea of the value of these parts that go back and forth?

A. They would run from 10 cents up to \$14.75.

Q. Would you have any idea of the total value of those parts in the course of a year?

A. Well, that would take some computation.

Q. In the course of a year?

A. I would say about \$15,000 in the course of a year.

Q. In parts?

A. Yes.

Q. Does the Ediphone division do anything else in that space around the premises at 10 East 40th Street except what you have described?

A. That is what we are there for.

Q. Selling and servicing?

A. That is right.

Q. Do you from time to time occasionally do any shipping of these machines or parts of these machines for the convenience of your customers to points or places outside of New York State?

A. Yes, upon his request we will ship one of his machines or all his machines, and we will pack his machines and ship them to some other office of his throughout the country.

By the Court:

Q. From this office at 10 East 40th Street do you make sales to anybody outside of the State of New York?

A. No, sir.

By Mr. Herwitz:

Q. Do you store a large quantity of merchandise at 10 East 40th Street?

A. Normally we keep three or four months' supply of equipment ahead all the time.

Q. Do you do any repair work on the premises?

[fol. 130] A. Where machines are required to be repaired, we might do it in their premises or our office, whatever the case may be.

By the Court:

Q. You mean the customer's machine?

A. That is right.

By Mr. Herwitz:

Q. Are some machines sent back to the factory to be repaired?

A. Not to be repaired, but sometimes they are sent back for scrapping purposes.

By the Court:

Q. You mean where you sell new machines and take the old one back?

A. That is it, and we send it back for scrap, and our factory gives us credit for the scrap. That is what we call an obsolete machine.

By Mr. Herwitz:

Q. Do you maintain daily communications with the West Orange factory?

A. Yes.

Q. Does that include all types of communication such as telephone, telegraph—

A. Principally telephone. We don't bother about telegraphing, we telephone.

By the Court:

Q. Have you a teletype machine?

A. No; we have lines direct to the factory—three or four lines, and we use those. We also have a messenger that goes there every day.

By Mr. Herwitz:

Q. Isn't there any particular delivery truck or trucks that operate between 10 East 40th Street and West Orange?

[fol. 131] A. Our factory truck delivers our equipment to us at our office 10 East 40th Street.

Q. Are those deliveries daily?

A. Ordinarily three times a week.

Q. Are those deliveries made pursuant to those requisitions which you have shown and which are contained in Plaintiffs' Exhibit 15 for Identification?

A. Correct.

Cross-examination.

By Mr. Proskauer:

Q. I just want to clear one point up with you. You do not requisition for each individual order you take from each individual customer, do you?

A. No, sir.

Q. You requisition to keep material in stock?

A. Yes, sir.

Q. And then you sell to people in New York City?

A. That is correct.

ASHTON M. TENNEY, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Q. Will you state your name?

A. Ashton M. Tenney.

Q. And your address?

A. 15 Oakdale Avenue, New Rochelle.

Q. Mr. Tenney, you are in business at 10 East 40th Street, are you not?

A. Yes.

Q. What space do you occupy?

A. The 39th floor and part of the 40th floor.

Mr. Herwitz: Mr. Levin, do you have the area?

Mr. Levin: 9470 square feet.

Mr. Herwitz: For both suites?

Mr. Levin: The total.

Q. Mr. Tenney, what is your business?

A. We are sales representatives for the Tennessee Eastman Corporation.

[fol. 132] Q. Will you tell us, Mr. Tenney, exactly what is done by you at the premises 10 East 40th Street?

A. We have an office in which we offer yarns there, Teeha or Ecota. They are yarns made by the Tennessee Eastman

Corporation for the various customers of the Tennessee Corporation throughout various parts of the country.

Q. You offer those things for sale, do you, Mr. Tenney?

A. Yes; we get offers for the purchase from the customers of the Tennessee Eastman Corporation.

Q. I am afraid I don't understand that. Is it something different from selling?

A. We are sales representatives and we offer these yarns to various of the Tennessee Eastman Corporation's customers.

By the Court:

Q. Do you mean when you find buyers you turn the orders in?

A. Whenever they want to make a purchase, we offer it to the Tennessee Eastman Corporation.

Q. Are these goods already available at the time you received the orders, or are they made up?

A. They may be either—either available or made up on order.

By Mr. Herwitz:

Q. What is the dollar value of these sales that take place in the course of a year?

A. You will have to get the amount from the Tennessee Eastman Corporation. I should say it amounts to hundreds of thousands of dollars.

Q. Might it be more than that; might it be millions?

A. Hundreds of thousands is the best estimate I can make.

Q. How many people are employed by you at 10 East 40th Street?

A. Outside of the office force or excluding the office force, there are six sales representatives.

Q. How large an office force do you have?

A. I'll have to count them up.

Q. Just approximately.

A. About 12.

[fol 133] Q. The Tennessee Eastman Corporation it has been testified to is a subsidiary of the Eastman Kodak Company, you know that, do you?

A. Yes.

Q. There are several other tenants in the building at 10 East 40th Street who are connected either with the Eastman

Kodak Company or the Tennessee Eastman Company, isn't that so?

A. I believe it is so, yes. I don't know it of my own knowledge.

By the Court:

Q. Do you have any business relations with any other tenant at 10 East 40th Street except the Tennessee Eastman Company?

A. No, sir.

By Mr. Herwitz:

Q. Do you use any pictures put out by the Eastman Company in connection with your work?

A. We do not.

Q. You are the sales representative for Tennessee Eastman Company that puts out the Techa product, is that right?

A. Yes.

Q. Don't you know that the advertising department of the Eastman Company or an advertising department of the Eastman Company, located in the building puts out publicity and releases it in connection with the same product?

A. Yes, I happen to know they put out advertising for the Tennessee Eastman Company.

Q. Don't you ever consult with them on business matters in connection with that?

A. We occasionally consult with them, yes.

Q. You were asked before whether you have any business dealing with any other concern in that building—

Mr. Proskauer: Just a minute; I object to that.

The Court: No, ask him if he has any relations with any other tenant in the building.

[fol. 134] Q. Have you any relations with tenants in the building?

A. No.

Q. What is the nature of these consultations that you say you occasionally have?

The Court: With whom?

Q. With the Eastman Company.

A. The advertising department of the Tennessee Eastman Corporation, do you mean?

Q. Yes.

A. We occasionally consult with them to see whether the type of advertising that they are putting out rightly shows the products which we have to offer to the trade. We are only in touch with them in a consulting capacity. We have nothing to do with advertising whatever.

Q. Do you consult them or do they consult you?

A. We consult them if we are so inclined, that is, if we want to get information what the Tennessee Eastman Company is doing, we consult them.

By the Court:

Q. In other words, what you seek to do is to find out what products of the Tennessee Eastman Company are being advertised?

A. That is correct.

Q. So that you will know that whatever you are offering to the public, if it is being advertised, you will have knowledge of what the advertising is?

A. Correct.

By Mr. Herwitz:

Q. Do you ever suggest advertising campaigns to them?

A. We make no suggestions about their advertising unless we are asked.

Q. Are you ever asked about that?

A. We are asked occasionally whether we like this advertising.

Q. How occasionally?

A. Oh, several times a year possibly.

[fol. 135] Q. Did you have a showroom in your office?

A. We have a showroom of the products that the Tennessee Eastman Company makes.

By the Court:

Q. Do you mean samples or stock?

A. We have samples only. We sell nothing.

By Mr. Herwitz:

Q. Do you have style shows there?

A. We occasionally have style shows where we are able to obtain the products in the market that contain Tennessee Eastman yarns when we will show the styles.

Q. And to these shows do buyers come?

A. No.

Q. Who attends these shows?

A. The only people that attend these shows are usually the retailers or the cutters who are to make fabrics that contain Tennessee Eastman products.

Q. Is the purpose for which these shows are held to give them ideas for the uses to be put of those products?

A. We often have inquiries about where products can be obtained that have Tennessee Eastman yarns in. For that reason we are glad to answer any inquiries regarding the sources.

Q. Who are the customers that you solicit?

A. They are the mills that manufacture the fabrics from the yarns. They are located in New England and the South and New York State.

Q. And do you carry on communications with them by means of the telephone?

A. Yes.

Q. And by mail and telegraph?

A. That is right.

Q. Do you have any teletype machines?

A. Yes.

Q. And do you use that to communicate with your customers?

A. No.

[fol. 136] Q. What is it used for?

A. We use it to communicate with the Tennessee Eastman Corporation.

Q. And what is the nature of such communications?

A. I have brought a sample of a teletype communication down, which I picked out at random.

The Court: Mark it Plaintiffs' Exhibit for Identification.

(Marked Plaintiffs' Exhibit 17 for Identification.)

Q. All the products which you manufacture are manufactured by the Tennessee Eastman Corporation at Kingsport, Tennessee, is that right?

The Court: You mean that all the products he manufactures, do you?

Mr. Herwitz: That he sells.

The Court: I suggest that you withdraw the question.

Q. All products that you have anything to do with concerning which your business is carried on at 10 East 40th Street are manufactured, are they not, at the Tennessee Eastman Corporation's factory at Kingsport, Tennessee?

A. Yes.

The Court: That might leave some doubt. I take it that the yarns are manufactured by the Tennessee Eastman Corporation, and those products in turn are sold to other manufacturers, such as mills, who fabricate those yarns into cloth and then that cloth is in turn utilized by other people for the purpose of making garments and what not?

The Witness: Yes, sir; you described that very well. The yarns and staple are the raw materials from which the cloth is woven, and they are sold by the Tennessee [fol. 137] Eastman Company to the mills which in turn manufacture fabrics—knitting fabrics or whatever the case may be.

Q. Do you have any testing apparatus?

A. Yes, we have apparatus for testing strength of fabric and to determine by microscopic tests an analysis of the fabric. The purpose of that is to determine what yarns are in the fabrics.

Q. Are those your own products that you are testing or somebody else's?

A. We have no fabrics of our own. They are fabrics that might contain our yarns or somebody else's yarns—either Tennessee Eastman Company's yarns or somebody else's.

Q. What use do you make of those tests?

A. Again I can show you a sample of test we make of such yards, which is a very good example.

The Court: Mark it Plaintiffs' Exhibit 18 for Identification.

(Marked Plaintiffs' Exhibit 18 for Identification.)

The Witness: In this case this was a fabric which the customer had asked us to determine what the yarns were. In all probability, although I did not check on this, but it is one of the possibilities in an examination of that kind, that this particular concern wished to determine whether or not the yarns that were in it could be developed or there could be used a substitute

in the form of a Tennessee Eastman yarn. In other words, there are many fabrics in the market, made up of different kinds of yarns and the mills are constantly using different kinds of yarns and our main purpose is to show whether the yarns are made by the Tennessee Eastman Corporation and are useful for that purpose.

[fol. 138] By the Court:

Q. That is the only reason you make the test?

A. We only make the test in the laboratory.

By Mr. Herwitz:

Q. What is done with those tests?

A. We keep them for our records. The sales representative contacts the customer and if they weren't good, they would not be offered by the Tennessee yarns for the purpose that it is required.

Q. Do you have any mimeographing machines?

A. No, sir.

Q. Do you do any advertising or publicity work from those premises?

A. No.

By the Court:

Q. You have no mechanical apparatus in your plant such as for spinning or weaving?

A. No, sir.

By Mr. Herwitz:

Q. You occupy space on the 39th and 40th floors?

A. The 39th and part of the 40th.

Q. What is on the 39th in distinction to the 40th?

A. On the 39th floor is our general offices and our individual offices. On the 40th floor is a room for exhibits of the yarns and staple and for consulting purposes and for showing the fabrics that contain Eastman acetate yarn.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. Just a question or two, Mr. Tenney. I understand you or your salesmen go out and solicit orders from people [fol. 139] who come in to you?

A. Yes, we determine whether or not they have any offers to make to the Tennessee Eastman Corporation.

Q. And when they make an offer, you submit that to the Tennessee Company down in Tennessee?

A. Kingsport, Tennessee.

Q. And they either accept or reject the offer as they see fit?

A. That is right.

Q. You don't make a sale yourself?

A. No, sir.

Q. There is a little confusion I think about fabric; you don't participate in selling any fabrics, do you?

A. None at all.

Q. These contacts that you make and talk about fabrics are just promotional things to increase the demand for the yarns?

A. To show the utilization of the Tennessee Eastman yarns in fabrics. They may be obtained from the market, that is taken at random, either from the Tennessee Eastman Corporation or it may be from a retail store or cutter, anywhere that we can obtain it.

By the Court:

Q. You only handle fabrics for the purpose of ascertaining what their basic content is?

A. Yes.

Mr. Proskauer: That is what I was referring to, in connection with the fashion show, your Honor:

The Court: I understand that.

By the Court:

Q. The purpose of the fashion show is to exhibit products which are made by various people for the purpose of showing the utility that may be made of the product of the

Tennessee Eastman Company that go into these garments, isn't that so?

A. Yes.

[fol. 140] Mr. Proskauer: That is what I wanted to to elicit, and you have done it much better.

The Court: You see, I was brought up in the wool industry.

By Mr. Proskauer:

Q. This testing that you said you did, that hasn't anything to do with manufacturing down in Tennessee, has it?

A. Certainly not.

Q. That is simply to inform you as to the possibility of the use of yarn manufactured by your people?

A. Correct.

Q. And you do not maintain any stock of merchandise at your place?

A. No sir.

Mr. Proskauer: That is all.

JOEL HAKANSON, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Joel Hakanson.

Q. And your address?

A. 9 Rollinson Street, West Orange, New Jersey.

Q. What business are you in?

A. Export.

Q. With what concern?

A. Thomas A. Edison, Inc.

Q. Where are your offices located?

A. 10 East 40th Street, the 25th floor.

Q. That is correct. Mr. Hakanson, will you tell us what business is carried on by you for the Edison Company at 10 East 40th Street?

A. Export sales of all Edison products.

[fol. 141] Q. What do you do in relationship to that?

A. We solicit orders abroad, enter the orders when they come in and ship them when they are in.

Q. How do you solicit the orders?

The Court: Let me inquire about this. Are all of these products which you sell manufactured when they come into your custody?

The Witness: Yes, they are already processed.

The Court: What your business is is to promote sales?

Mr. Herwitz: There is a little misapprehension there, your Honor. I don't believe he keeps a stock of merchandise.

The Witness: No, sir, we don't.

Mr. Proskauer: The Court said when they come in his custody. They come in his custody when he makes the sale of it.

Mr. Herwitz: He never gets the goods at all.

The Witness: We never see them.

By the Court:

Q. Where are the goods when you sell them?

A. In the factory. They are probably not ready yet. They have to manufacture them.

Q. You simply effect sales?

A. That is all.

Q. Of the products manufactured by the Edison Company at West Orange?

A. That is correct.

Q. And the sales you effect are for the purpose of export?

A. That is right.

Q. When you get these orders, you submit them to the factory at West Orange, New Jersey, and the orders are shipped from there to the persons to whom they are sold?

A. We make the shipments through our department.

Q. That is, you give the order to the factory and do [fol. 142] you make arrangements with the steamship companies or railroad companies for their export?

A. Yes.

By Mr. Proskauer:

Q. They are physically delivered from New Jersey; they do not come to you?

A. No, we never see them.

By Mr. Herwitz:

Q. On every such order, do you prepare certain shipping documents?

A. We do.

Mr. Proskauer: Those are the maritime bills of lading?

The Witness: Yes, ocean bills of lading.

Q. Do you know whether these goods were transported over to New York or Brooklyn by motor truck or whether they came over by rail from West Orange in carloads?

A. They probably came by our own truck.

By Mr. Proskauer:

Q. By "our own," you mean the company's New Jersey trucks at West Orange?

A. Yes.

By Mr. Herwitz:

Q. Have you salesmen all over the world?

A. No; we have distributors all over the world.

Q. Do you keep in contact with them?

A. Yes.

Q. By certain methods of communication?

A. By travel, by mail, by cable.

Q. You have salesmen traveling out of your office going all over the world?

A. Yes, we have two or three.

Q. You have any direct telephone wire to New Jersey?

A. Yes; we have two lines.

[fol. 143] Q. Do you have any teletype?

A. No.

Q. Are there any other officers of the company connected with the export and import division?

A. No.

The Court: You mean at 10 East 40th Street?

Q. In all parts of the world?

A. Only an office in London. That is what I mean by a branch office.

Q. Yes.

A. Yes, one in London.

Q. Are you in contact with them?

A. Oh, yes, sure.

Q. Can you give us any idea of the volume of sales made in the export and import division conducted at 10 East 40th Street?

A. We run between a half million and a million dollars.

Q. A year?

A. A year.

Q. When you receive orders, you of course notify the factory to that effect?

A. We place the order on the yellow sheet.

Q. As a result of your notification do they then manufacture for the orders that you have given them?

A. That is right.

By the Court:

Q. You mean by that that the merchandise is not made up until you get an order?

A. No; due to the fact that export equipment is different from domestic in many cases, like here.

By Mr. Herwitz:

Q. Are you from time to time consulted by the production department?

A. Oh, yes, all the time.

Q. Daily?

A. I would say so, yes.

Q. In connection with what?

A. With follow up deliveries and sometimes the order may not be clear as to what is required and we check back on it.

[fol. 144] Q. Do you give instructions how to make any particular item that is the subject of an order?

A. No.

By the Court:

Q. I suppose these articles are articles which are sold from catalogues?

A. Models.

Q. You have a particular design of a machine that you are offering and they are ordered by design numbers?

A. Correct.

OSWALD MERKT, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Oswald Merkt.

Q. And your residence?

A. Port Washington, Long Island.

By the Court:

Q. Do you have an office at 10 East 40th Street?

A. Yes.

Q. What is the name of your company?

A. Abbott, Merkt & Company.

Q. What space do you occupy?

A. Room 2001.

Q. How many square feet approximately?

A. Approximately 1960 square feet.

The Court: All right; we will take that subject to proper check.

The Witness: Possibly a little more.

By Mr. Herwitz:

Q. Mr. Merkt, what business are you in?

A. Engineering.

[fol. 145] Q. Do you have any other office except the office at 10 East 40th Street?

A. No, we have no other office.

Q. Will you describe for us the type of activities that are carried on at 10 East 40th Street by your firm?

A. We prepare plans and specifications for warehouses and manufacturing plants, that is, we prepared the plans and specifications from which the building is constructed.

By the Court:

Q. Do you supervise the construction?

A. We supervise the construction also.

Q. How many people are employed there?

A. Well, it varies a great deal. At the present time we have five. We have had as many as 40.

Q. When you have a job to do?

A. When we have a considerable amount of work.

Q. Do you specialize in constructing manufacturing plants?

A. Yes, warehouses and manufacturing plants.

Q. Are these warehouses and manufacturing plants constructed by you all over the country?

A. Yes.

The Court: When you say constructed by him, what do you mean?

The Witness: Designed by us.

By the Court:

Q. Designed or supervised by you. What percentage would you say of construction work you prepare or supervise is outside of the State of New York?

A. I would say 90 per cent is outside of the State of New York.

By Mr. Herwitz:

Q. Would you give us an idea of the total amount of business done by your firm during the course of the average [fol. 146] year?

A. Well, it will run from about \$3,000,000 to as high as \$11,000,000. That is the cost of the buildings themselves.

Q. Do you have drafting tables at your office?

A. Yes.

Q. How many?

A. I should say we have about 15 of them at the present time, but that is just a guess.

Mr. Proskauer: Won't you take a concession that as an engineer he prepares the plans and draws them?

The Court: We already have that. He said, "We prepare plans and specifications and supervise the construction when buildings are erected in accordance with those plans and 90 per cent of those buildings are erected outside of the State of New York." We have that all on the record.

Mr. Herwitz: That is a pretty good record.

The Court: After you get that, you proceed to ask questions concerning matters which I thought I was getting a concession for you.

Mr. Herwitz: I don't want to pursue it, your Honor.

The Court: Go ahead. I don't know what you want to prove. That is the difficulty. Go right ahead with your questions. I thought you were just asking for something that has already been asked and answered.

By Mr. Herwitz:

Q. Can you give me any idea of the number of blueprints that are made up in your office?

A. Well, that varies according to the size of the job. I should say in the case of a building running from a half million to a million dollars, there might be 30 or 40 drawings from which, of course, blueprints are made.

[fol. 147] By the Court:

Q. I suppose it depends on how many contractors you want to furnish blueprints to?

A. Yes.

Q. Do you give them away or sell them?

A. We give them a certain number.

Q. Then you don't get too many?

A. No; if he wants any more, he has to pay for them himself.

Q. You make enough blueprints to furnish a sufficient number to the responsible persons?

A. That is all. We specify in our contract with the owner how many blueprints we will furnish.

By Mr. Herwitz:

Q. Do you have any teletype machines in your place?

A. No.

By the Court:

Q. Do you have a blueprint machine in your place?

A. No.

Q. You have that done outside?

A. We have that done outside.

Mr. Herwitz: That is all; thank you very much.

Cross-examination.

By Mr. Proskauer:

Q. You do not sell any merchandise, do you?

A. No.

Q. You are an engineer?

A. We sell ideas.

The Court: He sells services.

Q. You prepare plans for buildings and then supervise the erection of the building?

A. Supervise and see that our ideas are carried out.

[fol. 148] Redirect examination.

By Mr. Herwitz:

Q. Do you buy anything?

A. Well, we buy drawing paper and so forth, but we don't buy equipment or material of any kind.

Q. Do you buy anything for the people for whom you work?

A. No.

JAN BERLAGE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Jan Berlage.

Q. Where do you reside?

A. 406 Langdon Terrace, Bronxville, New York.

Q. Do you occupy space in the premises at 10 East 40th Street?

A. I do.

Q. What number?

A. 4210.

Mr. Herwitz: How much square footage is that?

Mr. Levin: 1160 square feet.

Q. What business are you in, Mr. Berlage?

A. Importing and exporting business.

Q. Would you tell us—give us an idea of what the nature of the business is that you carry on at those premises and how it operates and so forth?

A. The business is done with foreign countries. We correspond by cable and by air mail.

By the Court:

Q. What products do you handle?

A. Raw materials for import and raw materials for manufacturing articles for export.

[fol. 149] By Mr. Herwitz:

Q. I don't understand the export and import business; do you buy and sell articles of merchandise?

A. That is right; and frequently we don't buy nor sell in our own name, but buy and sell through an account of others.

Q. Would you give us an idea of the volume of business that is done by your firm?

A. In 1941, the volume was several million dollars. In 1942 it was considerably less. In 1943, it is estimated, I would say at several times \$100,000.

Q. The war has put a crimp into it?

A. That is right.

By the Court:

Q. Do you confine your activities to any particular type of raw material?

A. There are certain raw materials in which we specialize, such as essential oils, spices, vegetable oils—that kind of material.

By Mr. Herwitz:

Q. Do you do any export business?

A. Yes, we export chemicals.

Q. Can you give us any idea of the amount of export, in dollar value done by you in the year 1941, let us say?

By the Court:

Q. This figure that you have already given is only of imports?

A. That was the combined total. In 1941 the export business might amount to—

Q. What percentage of the total would you say?

A. Maybe 5 per cent.

By Mr. Herwitz:

Q. When you import the merchandise here, is it for customers in New York State or New York City, or is it [fol. 150] for customers all over the country?

A. It is for customers all over the country, although in actual practice they are mostly in New York State and New York City.

Q. What kind of customers are there in the State of New York or the City of New York? That is, do they use the product you import, or do they in turn send it all over the country, do you know?

A. There are all sorts of varieties. In some cases the customer will use the material himself; in other cases he will resell it.

Q. Do you, in the course of your business, communicate by cable with foreign countries?

A. I do.

Q. Both for the export and import business?

A. Yes.

Q. Do you have teletype or teleprint in your office?

A. I don't know the difference between teletype and teleprint, but it is a machine installed by the cable company and records messages that the cable company sends directly to our office and vice versa.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. Just a question or two. You do not store merchandise in your premises, do you?

A. I do not. In exceptional cases, we receive a drum or we receive samples brought in by mail. Sometimes we receive a drum of this or that material.

Q. But generally you keep no merchandise on the premises?

A. No, generally we do not keep any merchandise on the premises. We make use of public warehouses.

Q. Sometimes in your transactions you act as agent under which you get a commission in the case of sale, is that right?

A. Correct.

Q. In other words, you trade in your own account?

A. Correct.

Q. What you do is take orders either for import or export, fill them by making purchases or sales as the case [fol. 151] may be and then order the goods shipped?

A. That is correct.

Q. With practically no storage of merchandise on premises?

A. Practically none.

WILLIS L. TOWNE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Willis L. Towne.

Q. And your address?

A. Stamford, Connecticut.

Q. Are you in business at 10 East 40th Street?

A. I am.

Q. What space do you occupy, Mr. Towne?

The Court: What is the number of the office?

The Witness: 4105.

Mr. Levin: 475 square feet.

Q. What business are you in?

A. Technical advertising.

Q. Would you tell us what that means?

A. Well, I write booklets, advertisements and mailing pieces with regard to machinery.

Q. Do you write these pieces at the premises in your office at 10 East 40th Street?

A. About half of them.

Q. Where do you write the other half?

A. On trains or in hotels.

Q. I suppose that is the advantage of living at Stamford?

A. No; I never write at home.

Q. In what publications do these articles appear?

A. The advertisements? In about 100 technical publications in this country.

[fol. 152] Q. Would you give us the names of a typical one?

A. Power, Food Industries, Iron Age, Heating Pipe and Ventilating.

Mr. Herwitz: I suppose it will be conceded that these advertisements appear in various magazines and publications which have an interstate circulation?

Mr. Proskauer: Unquestionably.

Q. Have you brought with you samples of some of your work?

A. Yes.

Mr. Proskauer: Your Honor, what has this advertising got to do with this case?

Mr. Herwitz: It is plaintiffs' contention, your Honor, that these advertisements and layouts and so forth, prepared at this office, is the preliminary stage which in its final stage, constitutes an article of production. Consequently we feel we should go into that.

The Court: All right, put them in. The gentleman testifies that he writes these advertisements and they are published in recognized trade papers. I am going to assume the nature of them. I do not know that it makes it any more certain to have the particular advertisement or one particular advertisement here. You might argue from that advertisement something and you will ask me to infer the same thing from other advertisements that the witness may write.

Mr. Herwitz: Your Honor, I should like to have this marked for identification.

The Court: I told you to go ahead and mark them.

(Marked Plaintiffs' Exhibit 21 for Identification.)

[fol. 153] Q. Is this a sample of one of your advertisements?

A. Yes, I wrote it.

Q. And is it an exact duplicate of some that you wrote?

A. Yes.

The Court: We are not going to doubt that. He says he wrote it. Whatever it is, it speaks for itself to anyone who can read.

Mr. Proskauer: Let me look at it and see what it is all about.

The Court: May I look at it too? I have not seen any of these exhibits and I am just curious to know how this enters into the question of production. I would expect that this is diagrammatic of something that has already been fabricated, isn't that so?

The Witness: Yes, sir.

By the Court:

Q. Somebody created an engine and you have made a drawing or reproduction of that engine or motor, and then you have written a description of it, is that it?

A. No, sir, I do not make the drawing.

Q. You get a drawing and utilize it as part of your advertisement?

A. That is right.

Q. And the advertisement is prepared by you for insertion in trade papers for the purpose of calling it to the attention of people who would be interested in the purchase of a machine of that sort, is that so?

A. Yes.

Cross-examination.

By Mr. Proskauer:

Q. You do not print these things on your premises, do you?

A. No.

Q. You sell service?

A. That is right. I don't do anything except with a pencil and a typewriter.

[fol. 154] Q. If you get an idea for advertising something, you write out the idea, get it approved by the client, I suppose?

A. It is not exactly in that sequence. I sketch out something like this and take it up with the artist.

Q. Then what does the artist do?

A. When the artist comes back with something like this, then I show it to the client and it progresses to another status.

Q. No physical preparation of this paper which is reproduced is done in your office at all, is it?

A. No, sir.

The Court: Excepting the preparation of the idea.

Mr. Proskauer: I excluded that. That is all.

HAROLD HEAP, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name.

A. Harold Heap.

Q. And your address?

A. 31 Ormond Place, Rye, New York.

Q. What business are you in?

A. Cotton piece business.

Q. With what firm are you connected?

A. Cherokee Spinning Company.

Q. Has that firm an office at 10 East 40th Street?

A. Yes.

By the Court:

Q. What is the number of the suite?

A. 3201.

Mr. Proskauer: The area is 770 square feet.

[fol. 155] By Mr. Herwitz:

Q. Is that the only office of the company?

A. That is right.

Q. At the premises 10 East 40th Street?

A. Correct.

By the Court:

Q. Where is the place of business of the company outside of New York?

A. Knoxville, Tennessee.

By Mr. Herwitz:

Q. Is the rent on the premises occupied by the company at 10 East 40th Street paid by the parent corporation?

A. Yes, sir.

Q. Will you describe the nature of the operations carried on at 10 East 40th Street?

A. We sell our merchandise which is practically all of the products of the mill.

Q. And will you tell us the type of merchandise manufactured by the mill?

A. Today it is Government contracts and men's wear.

By Mr. Proskauer:

Q. Cotton goods?

A. All cotton goods.

By Mr. Herwitz:

Q. To whom do you sell?

A. To men's wear houses.

Q. In what locality?

A. The majority in the City.

Q. And do you sell any outside of the City of New York?

A. Occasionally.

Q. Outside of the State of New York?

A. Yes, sir.

Q. Can you give us some approximation of the volume of sales outside of the State of New York during the course of a year, let us say?

[fol. 156] The Court: That is, made from 10 East 40th Street?

Mr. Herwitz: Correct; thank you.

A. We haven't any of those records at all. I cannot even estimate that.

By the Court:

Q. Can you give us an approximation as to the percentage of the business that you do in New York City as compared with what you do outside of New York?

A. It will be practically all in New York City. The percentage outside of New York City would be very small.

By Mr. Herwitz:

Q. Do you have any idea or can you give us any idea of the total volume of sales in the course of a year from the premises, 10 East 40th Street?

A. It is over a million dollars.

Q. Is it well over a million?

A. Frankly, I don't know at the present time. I know it is over a million.

Q. Was it well over a million, would you say?

A. No, it was around a million, but due to the changes today—

By the Court:

Q. You mean before you started on Government contracts it was around a million dollars?

A. Before we started on Government work, because the work is now largely Government work, and around a million dollars—I cannot state whether it is over that.

Q. Are all these contracts negotiated at 10 East 40th Street or are some negotiated at the mill or elsewhere?

A. Some at both places.

[fol. 157] By Mr. Herwitz:

Q. Who has charge of the business at 10 East 40th Street?

A. Sidney Blue.

Q. Is he the head of the company or what position does he hold?

A. There is no position in the company; he is just in charge of the New York office.

Q. Do you know how many different officers there are of the Cherokee Spinning Mills Company?

A. Four I know of offhand.

Q. Where are they?

A. All at Knoxville, Tennessee.

Q. Do you have any other sales offices other than the office at 10 East 40th Street?

A. None whatsoever.

By the Court:

Q. Do they make sales at the Knoxville, Tennessee, office, to your knowledge?

A. They do, sir.

By Mr. Herwitz:

Q. Do you know whether the sales made there are for customers all over the country?

A. The sales made there are practically Government contracts. The division sales are practically made 100 per cent at New York City.

Q. Are you speaking now of the current situation?

A. That is right.

Q. How long has that situation been current that you are now describing?

A. I have been there for two years and that has been current since I have been there.

Q. Is it your testimony that in the past two years they have done business almost exclusively on Government contracts from Knoxville, Tennessee?

A. Will you rephrase that question again, please?

Q. Is it your testimony that in the past two years the business done from the Knoxville, Tennessee, office has [fol. 158] been more or less confined to Government contracts?

A. Knoxville has been confined to Government contracts.

Q. The other business done by the company or the selling done by the company other than that is done at 10 East 40th Street?

A. Correct.

By the Court:

Q. That is the division plus some Government business?

A. That is correct.

By Mr. Herwitz:

Q. Do you know or can you tell us whether or not orders obtained as a result of the activities carried on at 10 East

40th Street are complied with or supplied by the mill in Tennessee to order?

A. I know, yes—

Q. I am afraid I haven't made my question plain.

By the Court:

Q. Do you carry any stock at 10 East 40th Street?

A. None whatsoever.

By Mr. Herwitz:

Q. When you make a sale at 10 East 40th Street, does the subject matter of that sale have to be made up specifically to the order you have obtained?

A. It does.

Mr. Proskauer: It is not on hand in Tennessee?

The Witness: No, sir.

Q. After the sale is made at 10 East 40th Street, do you send a direction to the factory or to the mill in Tennessee as to the point or place where the delivery should be made?

A. Sometimes. Sometimes the customers do it direct.

[fol. 159] Q. And do you know whether or not the merchandise ordered is then shipped from Tennessee across state lines to the customer, wherever he may be?

A. In most cases I know that it is.

Mr. Proskauer: We concede that.

The Court: If that were not so, they would have to make all deliveries in Tennessee.

Q. Can you tell us whether or not deliveries are made to customers outside of New York State?

A. Yes, they are.

Q. Do I understand that sales are made to representatives or customers in New York State and that the deliveries are usually made to those same customers at some place outside of New York State?

A. That is correct.

Q. Can you give us any idea of the percentage of sales delivered to customers outside of New York State?

A. I could not do that. I could not even estimate that. I don't know.

Q. Is it a substantial amount of the million dollars that you have talked about?

A. To what place?

Q. To customers outside of New York State?

A. I would say yes, substantially.

Q. How many people in addition to yourself and Mr. Blue are employed at 10 East 40th Street?

A. Two.

Q. Who are they?

A. Two young ladies.

Q. What do each of them do?

A. One is a stenographer and the other is a stylist and telephone operator.

Q. Did you say she was a stylist?

A. Yes, that is right.

Q. What does she style?

A. Handkerchiefs.

Q. Will you describe that operation and the purpose for which it is used and so forth?

A. All she does is just sketch or design handkerchiefs.

Q. Does she paint them on the premises at 10 East 40th Street?

A. That is correct.

{fol. 160} Q. And she drafts them?

A. No, just paints them.

Q. Will you give us a complete idea of the operation, if there is any, in connection with that?

A. There isn't any operation, except that the handkerchiefs would have a border on them, and the border is painted on paper instead of on the cloth. In other words, you paint a handkerchief corner, strip or border, whatever she would wish to call it.

Q. Is there a separate room in the premises where that work is done?

A. No.

Q. Are there facilities on the premises convenient to the appropriate doing of that type of work?

A. It would be done anywhere in the office. At the present, it is done at the switchboard.

By the Court:

Q. In other words, she acts as the switchboard operator and when she is not busy at the switchboard, she does this style work?

A. At the present time, yes.

Q. Together with her other work, she acts as a stylist?

A. That is right.

Q. Was there a different system employed before this?

A. Oh, yes.

By Mr. Herwitz:

Q. Will you tell us about that.

A. There was a different system; before we got into this war we employed more people at that time and we were able to maintain a telephone operator full time. Today you don't need that.

Q. When was it that more civilian sales work was done at those premises?

A. A year ago.

Q. And at that time did this designer spend all her time in designing?

A. That is right.

Q. Did she use a particular room on the premises for that purpose?

A. You can call it a particular room; it is a room in that office.

[fol. 161] By the Court:

Q. Is it where the telephone switchboard is?

A: Not that particular room. That is where the filing cards and reference cards are kept, and so forth.

By Mr. Herwitz:

Q. Is there a table in that room for the purpose of doing the work?

A. There is a desk there to do the work.

Q. Is there a table?

A: There is a table there for everyone's use, not specifically for hers.

By the Court:

Q. You mean a file room table?

A. A filing room table or where you may examine samples and things.

By Mr. Herwitz:

Q. Would you say that that room was set up with a view to having it used by the stylist for the purpose of making up these patterns?

A. Not specifically, no. It is just part of the office really; it is a record room when you come down to it. It is not a special room, it is just a record room.

Q. Is there a sink in the room?

A. Yes.

By the Court:

Q. They wash their hands there?

A. They wash their hands there, yes.

By Mr. Herwitz:

Q. Have you brought any samples with you of the type that is done by the designer?

A. Yes, I brought one down.

[fol. 162] Q. Can you let us see it, please?

A. Here is one.

The Court: Mark it Plaintiffs' Exhibit 22 for Identification.

(Marked Plaintiffs' Exhibit 22 for Identification.)

The Witness: That is a strip.

Q. Will you tell us what that strip is.

A. It represents a corner or strip of the handkerchief.

Q. Was that made on the premises?

A. Yes, sir.

Q. Is that the whole design for the handkerchief?

A. That is the strip for the handkerchief. Another strip like that was sent to the mill.

Q. And were handkerchiefs made up based on this design?

A. They were.

Mr. Herwitz: Would your Honor like to see that?

The Court: I know what it is.

Q. Is this design work done after an order is made or before an order is made?

A. Before, generally, but it could be either way.

Q. Do you go out and sell the design to a customer?

A. No.

Q. How does that work?

A. We sell a yardage of goods to a customer and he picks out a design that he likes or brings in his own design.

Q. How many such designs are made up at the premises 10 East 40th Street in the course of an average month?

A. I don't know. It would depend on how much time is available.

The Court: And whether the customer furnishes the design or whether you furnish it, isn't that right?

The Witness: Or what it is or how complicated it is, or how much thought the person has to give on what they want to do. You cannot determine it.

[fol. 163] By Mr. Herwitz:

Q. You have a teletype machine on your premises?

A. We do.

Q. Do you send instructions over your teletype machine to the factory in Tennessee?

A. We do.

Q. From time to time do those teletype instructions include instructions or directions with respect to the designs prepared at 10 East 40th Street?

Mr. Proskauer: I am objecting to the word "instructions." Let him state what it is done.

The Court: Sustained. Reframe your question.

Q. Is anything sent over the teletype machine to the factory in Tennessee with respect to designs made at 10 East 40th Street as you have described?

A. Why yes, I would say yes, plus cost.

Q. Tell us about that—will you explain that cryptic message?

A. If we mail a design down, we have to indicate what its cost, and then they make up their costs or charge, rather, plus cost; but which way that is done, if you are not interested in that—

By the Court:

Q. When you say "plus cost," that means the profit above cost?

A. They have to figure the cost on that article and then forward it to us. They may ask certain questions about something which might not be clear to them.

By Mr. Herwitz:

Q. As to the nature or character of the design?

A. That is right.

Q. Or the makeup of it?

A. The makeup is on the instruction sheet. The makeup is all worded right on it.

[fol. 164] Q. In other words, when you send a design down to the factory, it is supposed to contain all of those facts which would be necessary to put that design in it in order to produce the product?

A. That is right.

Q. In addition to handkerchiefs, is anything else manufactured there?

A. Shirts.

Q. Are they also designed at 10 East 40th Street?

A. Very few.

By the Court:

Q. Does your company furnish the shirts made up or just furnish the bolts?

A. We furnish it in bolts. In other words, we do not process it in the finished state. It is sold in grey state.

By Mr. Herwitz:

Q. I am not sure that I understand the last answer you have just given. Would you elaborate that a little bit?

A. That is sold in the grey or unfinished state.

Q. After the work is done at your mill, it is sent to what sort of plant?

A. Finishing plant.

Q. Are any particular plants used, or is that at the discretion of the customer?

A. Discretion of the customer.

Q. After it is sent to the finishing plant then what happens to it ordinarily?

A. I don't know.

Q. Is it then ready to be sold?

A. I don't know.

By the Court:

Q. Is the job in the mill finished when it goes to the finishing mill?

A. That is right.

Q. In other words, you sell as is?

A. In the grey.

By Mr. Herwitz:

Q. Is there any other work done at 10 East 40th Street in addition to selling and designing?

A. None whatsoever.

[fol. 165] Q. Is any purchasing done from that office?

A. None at all.

Q. Did you say that you were a salesman?

A. Yes, sir.

Q. Do you do any traveling in connection with your work?

A. No.

Q. Do you ever make trips?

A. I make a trip to the mill occasionally.

Q. For what purpose do you make these trips to the mill?

A. To meet people, find out what is going on there and what we should change our ideas on, if necessary.

Q. Do you give the mill any advice or suggestion in connection with the production work at the mill?

A. It is the opposite way around.

Q. Just tell us what you mean by that.

A. They make the suggestions as to what we should sell.

Q. Is your selling work done by personal contact or going out of the office?

A. Mostly in the office—well, and personal contact—

Q. In other words, your customers usually come to your office and you show them various designs, is that the way it works?

A. Either that or they bring their own.

Q. When they bring their own is any work done on those designs at the office?

A. No, none at all.

Q. Are any corrections ever made on those designs?

A. That is possible.

Q. And are those corrections made at the office at 10 East 40th Street?

A. They would be, if any are made.

Q. Is any merchandise kept at 10 East 40th Street?

A. None at all.

Q. For sample purposes?

A. For sample purposes and just for a reference chart.

Q. Swatches?

A. Swatches.

Q. Where do they come from?

A. They come from Knoxville, Tennessee.

Q. Do they send them to you frequently?

A. Whenever they have a sufficient amount to make up a package for mailing, that is all—no specific time.

[fol. 166] Q. Are there any warehouses connected with the company in this locality?

A. None at all.

Q. Before you accept an order you check with the company in Tennessee?

A. Yes, sir.

Q. Does that checkup include ascertainment whether or not the factory is able to produce that which has been ordered?

A. Yes, sir.

Q. Does your office from time to time make any estimate of anticipated sales and supply those estimates to the factory?

A. No. We make estimates of sales but specifically for our own purpose.

Q. For a sales purpose?

A. That is right.

By the Court:

Q. Do you mean you make that estimate before or after they have been made?

A. Before they have been made.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. Your company weaves cotton cloth?

A. Correct.

Q. And when that comes off the looms, that is called grey goods?

A. Yes.

Q. That has no color on it at all?

A. The grey goods we manufacture has yarn dyes.

Q. You use some yarn dyes?

A. Yes.

Q. Which means when you weave, you use a yarn that has already been dyed?

A. That is correct.

Q. And all the manufacturing is done down in Tennessee?

A. Every bit of it.

Q. With the handkerchiefs such as the design as shown on this paper which has been marked Plaintiffs' Exhibit 22 for Identification, would that color be obtained by using yarn-dyed material?

A. That is right, although at times we might not even [fol. 167] color it the way the designer has painted it.

Q. That would be done, in turn, by the finishing company to which it is sent?

A. No; that would be done by a yarn that we use in the dyed state; but when that has been painted with a blue border, the customer might wish brown, green or wine, and he will not use the blue.

Q. You never had more than one person there that used to make these designs, did you?

A. We used to have two.

Q. How long ago was it that you had two?

A. About two months ago.

Q. Up to two months ago you had two?

A. That is right.

Q. And they worked in this room which you have described as the file room?

A. Yes, sir.

Q. And that would be, as I understand it, if a customer came in and said he wanted to buy some grey goods or have some grey goods made up for him to make handkerchiefs out of, in order to facilitate the sale, you would have this designer,—if he did not bring his own designer—sketch some handkerchief designs?

A. Yes, or use some that had already been sketched.

Q. Or use some that had already been sketched?

A. Right.

Q. So that the only purpose of these designs was to show to the customer what you could make down there

which would produce the kind of handkerchief that he wanted?

A. That is correct.

Q. Sometimes the customer brought in his own designer, did you say?

A. That is right.

Q. Sometimes he would say, "Can you show me a design for some handkerchiefs?"

A. Yes.

Q. And if he liked the design, he would say, "Make me the grey goods out of which I can make handkerchiefs like this"?

A. That is right.

[fol. 168] Q. The only thing that was done on the premises was that these two girls would perhaps sketch one of these designs out of which a handkerchief could be made?

The Court: Outside of the sale, and sometimes they would utilize the design with a modification of the colors, is that it?

The Witness: That is right.

Q. The major portion of your business is shirtings, isn't it?

A. In Normal times, yes, sir.

Q. Up to when was the major part of your business shirtings?

A. I believe the latter part of 1940 and the first part of 1941, in that period.

Mr. Proskauer: That is all.

Redirect examination.

By Mr. Herwitz:

Q. These two girls that you say you had up to two months ago were at those premises and hired and employed specifically for the purpose of designing handkerchiefs, is that correct?

A. Well, at that time we still had one operating switch-board.

Q. But originally?

A. Originally, way back, yes.

By the Court:

Q. What do you mean by "way back"?

A. When the office opened.

Q. When was that?

A. In 1939.

By Mr. Herwitz:

Q. Until the war emergency took place?

A. That is right.

Q. When do you place that, as far as you are concerned?

A. Over a year ago.

[fol. 169] Q. Perhaps I don't understand. Plaintiffs' Exhibit 22 for Identification would ordinarily, after approval by a customer, be sent down to the factory at Kingsport, would it not?

A. Knoxville.

Q. Yes, I mean Knoxville, and all these designs made at 10 East 40th Street when approved by the customer, or the subject of an order or proposed order, would be sent from the premises 10 East 40th Street to the mill in Tennessee, is that correct?

A. That is correct.

Q. And that was of frequent occurrence, was it not?

A. Yes, sir.

Q. Is the design or sketch and the photograph appearing on Plaintiffs' Exhibit 22 for Identification necessary to the work that is done in the mill? Do they need it?

Mr. Proskauer: I object to that as incompetent.

The Court: Well, I will sustain it on account of the word "necessary." I think it is for the Court to determine whether it is necessary or not. I have heard the testimony as to the circumstances under which the design was used and I heard the testimony with respect to what was done.

Mr. Herwitz: I offer this exhibit in evidence.

The Court: Any objection?

Mr. Proskauer: None at all.

(Marked Plaintiffs' Exhibit 22 in Evidence.)

Recross-examination.

By Mr. Proskauer:

Q. This room that these two girls worked in, when you had two, how big was that room?

The Court: You say it is 770 square feet now?

Mr. Proskauer: In the whole premises, yes.

A. I would guess that it was less than a third of that square footage.

[fol. 170] Q. You say you guess; that is your estimate?

By the Court:

Q. How would it compare with the size of this room?

A. Just the tail end of it, probably as long as this wood here and probably 12 feet from that corner.

Q. What would you say is the size of this room?

A. About 18 feet I should judge.

The Court: I would say 20 to 22 feet.

Mr. Proskauer: 240 or 250 square feet, would that be about right?

The Court: About 240 square feet.

Mr. Proskauer: That is all.

Redirect examination.

By Mr. Herwitz:

Q. Do I understand, Mr. Heap, the design work was not confined to that room, but was done from time to time in the office?

A. No; it isn't even done in that room. It is done on the telephone table.

Mr. Proskauer: That room was always the file room, was it not?

The Witness: That is correct.

WILLIAM ENGELS, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. William Engels.

Q. Where do you reside?

A. 2870 Marion Avenue, Bronx.

[fol. 171] Q. Mr. Engels, what firm are you connected with?

A. Domestic Concentrates, Inc.

Q. Where is that firm located?

A. 10 East 40th Street.

Q. And what space do they occupy? What is the suite number?

A. Room 2510.

Mr. Proskauer: The area is 200 square feet.

Q. What business is Domestic Concentrates in?

A. May I just make an explanation?

By the Court:

Q. Just a moment; I will straighten it out. Is the present name Domestic Concentrates, Inc.?

A. Yes.

Q. What was it before that?

A. The Benjamin Franklin Import and Export Corporation.

Q. When was it changed.

A. In March, 1942.

The Court: Now, will you repeat the previous question? (Question read.)

The Witness: It is in the business of manufacturing food flavors, and at the same time in the business of exporting chemicals.

Q. What business was the Benjamin Franklin Corporation in before the name was changed?

A. In the export of chemicals, which was their business exclusively up until March, and we carry on the residue of that business.

Q. Since you have added the manufacture of food flavors?
A. Precisely.

Q. How long was the Benjamin Franklin Company a tenant of these premises?

A. I should say, your Honor, approximately about a year or a year and a quarter up until March, 1942.

[fol: 172] By Mr. Herwitz:

Q. You say they are in the business of exporting chemicals?

A. Yes.

Q. Do I understand their business was to purchase chemicals in the United States?

A. Yes, sir.

Q. To be sold to manufacturers in foreign countries?

A. Yes, but for the account of another company that we factored.

Q. Do you know whether the chemicals were purchased in different parts of the United States?

A. I would have to hazard a guess on that.

By the Court:

Q. Were you connected with the company then?

A. No, I was not, your Honor. I was merely fortunate enough to get together the data from the accountant, but I think I can answer the question.

Mr. Proskauer: I think I can help you out on that.

May I talk to the witness with Mr. Herwitz, and I will stipulate what the papers show?

Q. Does that show what the business was?

A. Yes.

Q. How much was it?

A. Up to December, 1941, since the time of its inception, \$32,000.

Q. Whether these chemicals were purchased in the City of New York, State of New York, or out of the State of New York, they went into export commerce?

A. Yes.

Mr. Proskauer: Into foreign countries.

The Court: That is export commerce.

Q. Therefore any person who had been connected with the Benjamin Franklin Corporation who might testify

would only be able to testify that they did \$32,000 worth of [fol. 173] business up to December 31, 1941, is that right?

A. And \$38,000 up to June 1, 1942, or a total of \$70,000.

Q. Up to June 1, 1942?

A. Yes.

By Mr. Herwitz:

Q. Those chemicals, no matter where they were bought went into export out of this country?

A. Yes.

Q. Do you know how many people the Benjamin Franklin Corporation employed?

A. Yes; they employed Mr. Benjamin Franklin Baker, one secretary and—

By the Court:

Q. How many does the present company, Domestic Concentrates, Inc. employ?

A. Seven or eight.

Q. Do you have any breakdown between the food flavors and the chemicals?

A. Yes, very decidedly.

Q. What part of your business is food flavors?

A. Today, your Honor?

Q. Yes.

A. The chemicals being \$20,000 and the food flavors \$24,000. That is approximately.

Q. What do you do with the food flavors, do you export that or sell it locally?

A. We sell it all over the country.

Q. How about the chemicals?

A. That is export.

Q. Export only?

A. Yes, sir.

By Mr. Herwitz:

Q. Where do you manufacture the food flavors?

A. At 124 West 18th Street.

Q. What is done at the premises 10 East 40th Street with respect to your manufacture?

A. Just office detail.

Q. Including what?

A. About the mailing of invoices, interview salesmen.

[fol. 174] By the Court:

Q. Where are the sales made from?

A. Precisely, your Honor, some are made at the client's place of business—

Q. Where do the salesmen operate from, the office at 10 East 40th Street or the factory?

A. No, they operate from the office, and the others operate in their own offices.

Q. Have you any idea of this \$24,000 how much of it was sold and shipped out of the State to other states?

A. Of the total amount?

Q. Yes, of the \$24,000.

A. I could make a very rough guess, your Honor, which is fairly accurate, and the reason is because the largest customer we have, the Sheffield Farms, take approximately 50 per cent.

Q. Where do you make delivery of that?

A. At our plant.

Q. What is the percentage of the total volume?

A. About 50 per cent. We sold 40 to 50 thousand pounds of this product to Sheffield. Another few per cent went—another 10 per cent went to New York, the balance to New Jersey, California, St. Louis,—all over the country.

By Mr. Herwitz:

Q. Do you maintain daily, frequent contact with the factory?

A. Oh, yes.

Q. Are you familiar with the production that goes on there?

A. Yes.

Q. Are you in charge of that production?

A. Yes.

Q. You personally?

A. Yes, in a manner.

Q. Don't you carry on your work from 10 East 40th Street?

A. That is right.

Q. Do you give instructions to the factory with relationship to production?

A. Yes.

Q. From the premises 10 East 40th Street?

A. Yes.

Q. How do you do that?

A. Over the telephone.

[fol. 175] Q. Where are the raw materials obtained from which these products are manufactured?

A. You are talking now about the food flavor?

Q. That is correct.

A. Very specifically, some are obtained in Brooklyn.

Q. Not from outside of New York State?

A. Well, if there are, it is in very, very minute quantities, although we may receive something from Jersey, but it is billed from the New York jobbers.

By the Court:

Q. Do you buy from New York or New Jersey?

A. We buy from New York.

Q. And the chemicals that you export, where do they come from?

A. I believe they come mostly from out of town, New Jersey. They are sold by New York companies—New York jobbers.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. The actual manufacture of these food flavors is all done at 18th Street?

A. Entirely.

Q. Have you technical men there who are in charge of that?

A. We have technical laboratories at 110 West 18th Street.

Q. When you say you gave instructions—or used some such phrase as that—you did not mean that you were a technical man that gave instructions about the manufacture?

A. No.

Q. What you mean when you talk about instructions is that you stated what you had sold or you gave shipping instructions, that sort of thing?

A. Oh, yes.

Q. And had nothing to do with actual process of producing?

A. No. That is supervised by a chemist at a different address.

[fol. 176] MAURICE R. SANBORNE, called as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Maurice R. Sanborne.

Q. Your address?

A. 100-40 196th Street, Hollis, Long Island.

By the Court:

Q. Are you connected with any tenant at the premises 10 East 40th Street?

A. No, sir.

By Mr. Herwitz:

Q. Do you work at 10 East 40th Street?

A. Yes.

Q. With what firm are you connected?

A. The C. I. T. Corporation.

Q. Does that corporation occupy certain space at that building?

A. That is right.

Q. What space?

A. Room 3610.

Mr. Herwitz: Is that 1500 square feet, Mr. Levin?

Mr. Levin: That is right.

Q. That is the Commercial Investment Trust Company?

A. That is right.

Q. Will you describe, Mr. Sanborne, what the business of that company is?

A. Our business is installment sales financing.

Q. Will you for the record tell us what that means?

A. That means if a man wants to buy an automobile, and goes to a dealer's place of business, the sale would be consummated and the man might pay a certain amount

{fol. 177] of money down on the purchase price of the automobile and the balance would be advanced by us through a conditional sales contract, which the dealer would take from the buyer and that, in turn, would be purchased by us.

Mr. Proskauer: That company has a great many branches and this is just one branch.

Mr. Herwitz: That is right.

Mr. Proskauer: I am a stockholder of it and have been for a long while and know all about it.

Q. The C. I. T. Company has branches all over the country?

A. That is right.

Q. All over the world, as a matter of fact?

A. No, in this country.

Q. Is this office at 10 East 40th Street one of the branch offices of the company?

A. That is called the divisional office.

Q. Where is the main office of the company?

A. One Park Avenue.

Q. What specific phase of the work is done out of the premises occupied by your company at 10 East 40th Street?

The Court: You mean from it, don't you?

Mr. Herwitz: From it.

The Court: Out of it might mean having no connection with it.

Q. From those premises.

A. Well, I go out in the territory and contact the various automobile dealers and we buy good will and sell them C. I. T. service.

Q. What area is covered by that division?

Mr. Proskauer: Would it help if I concede it goes all over the country and they solicit automobile dealers, make contracts, and the C. I. T. finances their sales [fol. 178] contracts on the purchase of automobiles. That is what you do, isn't it?

The Witness: That is right.

Mr. Proskauer: Do you accept that concession?

Mr. Herwitz: I don't know whether that is the whole story, but I will accept that.

The Court: Never mind this, go ahead.

Let me ask the question that I think can settle the whole business. Can you give us any reasonable idea of the volume of business that is done from the divisional office at 10 East 40th Street?

The Witness: We don't buy any business at 10 East 40th Street. The business is purchased through the branch offices.

The Court: The branch office benefit from the contracts that you endeavor to make, is that it?

The Witness: Well, we have an office on Broadway and 57th Street; we have an office in Jamaica and one at White Plains, New York; also New Haven, Connecticut; Newark, New Jersey and Perth Amboy.

The Court: Do you seek to build up any business outside of New York City and New Jersey?

The Witness: Yes, we contact dealers in New Jersey and in Connecticut.

Q. Do you have any branches in New Jersey?

A. Yes.

The Court: And Perth Amboy he says.

Q. And do you supervise them in their purchases of installment paper in those localities?

A. I supervise the men who make the contacts with the dealers. I sometimes make the contact with the dealer and distributor of automobiles myself.

Q. Are you virtually engaged in daily contact with all the branches under your supervision?

A. That is right.

[fol. 179] Q. Including the ones in Jersey and Connecticut and so forth?

A. That is right.

Q. How do you maintain this contact?

A. By going over to Jersey and by telephone.

Q. Can you give us an estimate of the amount of business done by the various branches under the supervision of the division?

Mr. Proskauer: I am ready to concede that while now it is substantially nothing that before the war emergency it was substantial in amount, if that will help.

Mr. Herwitz: That will help somewhat but I would like to get an appropriation.

The Court: All this witness could do probably is to guess.

The Witness: We don't fix up the paper in 10 East 40th Street; that is done through the various branches.

Q. Was it many, many millions of dollars?

A. Not so many.

Q. But many?

A. There would be some.

Q. Some millions?

The Court: Not now.

Mr. Proskauer: He is referring to the period before we got into the war.

The Witness: Yes, as you know, your Honor, no automobiles have been sold or very few are being sold today.

The Court: I know there are some.

The Witness: Very few.

Q. When was it that the business ceased as a result of the war effort?

A. 1942.

[fol. 180] JOHN H. LOTHIAN, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name?

A. John Harness Lothian.

Q. And your address?

A. Fores Road, Allendale, New Jersey.

Q. What business are you in, sir?

A. The firm I work for is engaged in the manufacture of wooden boxes and box shoos. The shook is the necessary part of the boxes ready to be nailed in.

Q. What is the name of the firm?

A. J. H. Dunning Corporation.

Q. Does it have an office at 10 East 40th Street?

A. It does, at room 3504.

Mr. Herwitz: How much space is that, Mr. Levin?

Mr. Levin: 1100 square feet is the area.

Q. Is that the only business of the company?

A. That is the only business of the J. H. Dunning Corporation.

Q. Is the J. H. Dunning Corporation connected with any other corporation?

A. Yes, we own various corporations.

Q. Are the corporations that you own engaged in the manufacture of these shooks which you sell?

A. They are. We sell the entire production and also a lot of other materials which we don't make.

Q. Will you tell us the names of the companies which are wholly owned by the Dunning Company?

The Witness: Your Honor, do I have to do that?

Mr. Proskauer: What is the materiality of that?

Mr. Herwitz: I will withdraw the question.

[fol. 181] The Court: The question is how much business is done out of this office of theirs.

Mr. Herwitz: I would just like first to get the locality without the names of some of the places.

Mr. Proskauer: Why don't you take a concession on that?

By the Court:

Q. Do you sell anything besides wooden boxes?

A. We also sell the by-products of them, sawdust, waste, which runs into a considerable figure.

Q. Do the orders for the sale of those products come from 10 East 40th Street?

A. That is right.

Q. Deliveries are made from where?

A. North Windham, Maine, Biddeford, Maine, Decatur, Alabama, Richmond, Virginia, San Francisco, California.

Q. Are they made to various places in the United States?

A. They are all over.

Q. And to deliveries across state lines?

A. That is right.

By Mr. Herwitz:

Q. Can you give us an approximate idea of the total volume of sales that you make from the New York office?

A. I can if the marshal will let me have my coat. I wanted to wear it, but he objected. From November, 1938,

to June 1, 1942, our sales totaled \$1,476,000, of which \$592,000 were New York State sales, and \$885,000 out of state, or a ratio of 40 per cent of our business is in the State of New York and 60 per cent is out of the state.

Q. When you say that a certain proportion of sales are in New York State, does that mean that deliveries would be made in New York State?

A. That is right.

[fol. 182] By the Court:

Q. From outside of the state?

A. That is right.

By Mr. Herwitz:

Q. How many persons are employed at the premises 10 East 40th Street?

A. 10.

Q. Do you hold any office in the company?

A. Well, you might say I am a minister without portfolio, sir, in that I have no designation of title but I am a great deal— shall we say of the persuasive type. I am the man Friday for the president.

Q. Is the president located at 10 East 40th Street?

A. Yes.

Q. Are all these various factories in constant contact with the president?

A. They are. They don't blow a whistle without his approval or sanction.

Q. Does that include blowing the whistle regarding production in these various factories?

A. That is right.

By Mr. Proskauer:

Q. No manufacturing is done at 10 East 40th Street?

A. That is right.

By Mr. Herwitz:

Q. You don't do any manufacturing at 10 East 40th Street?

A. No, sir.

Q. When you speak of blowing a whistle, what do you mean?

° A. I mean everybody takes his orders from 10 East 40th Street.

Q. He instructs them what to make, I suppose?

A. No, that is hardly possible. Our customers or our clients instruct us what to make for them. So much today is [fol. 183] Government work which has to be made to Government specifications, so we have no option.

Q. You have a foreman at these various factories?

A. That is right.

Q. Superintendents?

A. That is right.

Q. And they control the actual process of manufacturing, don't they?

A. That is right.

Q. The president doesn't blow a whistle to indicate to them what work is to be done?

A. He tells them how many orders to work on; whether they shall shut down Saturday afternoons or continue until 5 or 6 o'clock.

By the Court:

Q. These men don't whistle during working hours, do they?

A. We don't have much privilege in that respect.

By Mr. Herwitz:

Q. Do they have a teletype in the office?

A. Yes.

Q. Is it connected with all the factories?

A. We can raise them and we can send messages to all of them.

JOHN J. MACKAYE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name.

A. John J. MacKaye.

Q. And your address?

A. 114 East 84th Street, New York City.

Q. With what firm are you connected, Mr. MacKaye?

A. Vanity Fair Mills, Inc.

Q. Is that company located or does it have an office located at the premises 10 East 40th Street?

A. Yes.

[fol. 184] Q. What suite number does it occupy?

A. The fifteenth floor.

Q. The entire floor?

A. Yes.

Mr. Proskauer: 6415 square feet.

Q. What is the nature of the business of the company?

A. The company manufactures ladies' hosiery and underwear.

Q. Where is the manufacture of those articles performed?

A. Reading, Pennsylvania, Monroeville, Alabama, and Jackson, Alabama, and New Holland, Pennsylvania.

Q. What business of the company is done at 10 East 40th Street?

By the Court:

Q. What is your connection with the office at 10 East 40th Street?

A. I am assistant sales manager.

Q. How many people are employed there?

A. If you will give me a moment—

Q. Yes, take your time.

A. 12.

By Mr. Herwitz:

Q. Will you describe the activities carried on at 10 East 40th Street by these employees?

Mr. Proskauer: I don't mind if you lead him from the deposition.

The Witness: It seems to me, if I may interject, I have given that testimony before.

Q. Yes, I know you have.

A. The New York office is a sales office and every person connected or employed by the New York office contributes to the sales function.

Q. Will you describe those functions?

[fol. 185] A. Waiting on customers; we take their orders; we have telephones which require telephone girls; we have an office boy, and we keep some of our records there.

By the Court:

Q. Do you keep any stock on hand at 10 East 40th Street?

A. No, sir; samples only.

Q. Do your salesmen go out from the office and make sales, or are the sales made at the premises?

A. The sales are made in the premises.

Q. Do you sell according to sample or do you sell goods already made up?

Mr. Proskauer: Those particular things are not exclusive; are they? I think they sell from samples, goods already made up.

The Witness: From the question asked by this gentleman, the issue is what the function of the New York office is. As far as the New York office is concerned, we sell from samples.

By the Court:

Q. Are the goods already made up of which you use samples?

A. Some.

Q. Or are the goods made up to order after they are sold?

A. In part made up.

Q. Can you tell us approximately what the total volume of business is resulting from sales made from the New York office?

A. I cannot.

Q. And are those orders filled at the factories that you designated?

A. Yes.

Q. And shipments are made from the factories?

A. Yes.

Q. To the purchasers?

A. Yes.

[fol. 186] Q. And in making those sales, do you cover any particular territory or do you cover anywhere in the United States where you can make a sale?

A. As far as the New York office is concerned, I take the order anywhere in the United States if the purchaser visits us.

Q. You say that your sales are made to people who do visit your office?

A. Yes.

Q. Your salesmen don't go out looking for sales, the prospective purchasers come to 10 East 40th Street?

A. Yes.

By Mr. Herwitz:

Q. Do these customers have a place of business in all parts of the country to which deliveries are made from those various factories that you have mentioned?

A. Yes.

Q. In other words, you have said that you have a factory in Reading, Pennsylvania; goods manufactured at Reading, Pennsylvania, are delivered to customers all over the country as a result of sales made?

The Court: They are delivered to customers wherever they are or where they direct deliveries to be made.

Q. Those customers' deliveries are made all over the country?

A. Yes sir.

Q. Is there also an advertising office maintained at the premises 10 East 40th Street?

A. Yes.

Q. And is copy prepared for advertising of the Vanity Fair Silk Mills at the premises 10 East 40th Street?

A. Copy is prepared by our advertising agency upon conference with our advertising management.

Q. At 10 East 40th Street?

A. That is right.

Q. And as a result of those conferences, this advertising on a national scale results therefrom?

A. Yes.

[fol. 187] Q. Do you know whether any samples of pictures or sketches are submitted at the premises at 10 East 40th Street by your advertising agency to the advertising manager?

A. Yes, but it is the reverse: The advertising agency submits them to our advertising manager.

The Court: That what he asked you?

Q. Do you know whether from time to time corrections are made or suggestions made by your advertising manager to your agency with respect to those samples submitted?

A. Naturally.

Q. That is the purpose for which it is submitted by your advertising agency?

A. Yes.

Q. Do you know whether any copy is written at the premises 10 East 40th Street?

A. Very seldom. The usual procedure, as I said before, is to have the advertising agency prepare the copy and submit it to the manager.

Q. Are suggestions made for an advertising campaign by your advertising manager to your advertising agency at the premises 10 East 40th Street?

A. No.

Q. The ideas come from the agency, is that your testimony?

A. Right.

By the Court:

Q. Your advertising agency is not located 10 East 40th Street, is it?

A. No, sir.

Q. Are any sales made as far as you know at any of the factories direct?

A. Sales are made to employees.

Q. But not to the general public, that is what I mean?

A. I don't know.

Q. In other words, what I am trying to find out is whether all sales are made through your agencies, or are there some sales made by the factory direct?

A. If a customer visited our mill at Reading,—I cannot [fol. 188] say about Monroeville or Jacksonville,—if a customer visited our mill at Reading, Reading can fulfill the function of the sales office.

By Mr. Herwitz:

Q. You give to your customers some kind of mat service or layout service, is that what you call it?

A. Yes.

Q. Will you describe what that is and how that works.

A. A mat is a print of an advertisement and is part of our sales function that we prepare through our advertising agency, being certain advertisements which our customers may use. If our customer desires to use these advertisements, they write in generally to Reading and they receive copies of pictures or mats which they use if they so desire.

By Mr. Proskauer:

Q. They use them in the local paper there?

A. Ostensibly.

By Mr. Herwitz:

Q. Do you keep a stock of those mats at your premises 10 East 40th Street?

A. No, we have some samples that we receive from Reading.

Q. Do you receive any orders from anybody else for mats?

A. I cannot say with accuracy, because that mail would be routed to the advertising manager. Occasionally an order for a mat would come to the office in New York and in that case we would do as we do for an order of merchandise, send it to Reading.

Mr. Proskauer: Are mats sent out from Reading?

The Witness: Yes, sir.

[fol. 189] By Mr. Herwitz:

Q. You did have a teletype machine, did you not?

A. Never at our present office.

Q. Never at 10 East 40th Street?

A. No.

Q. Have you estimated the dollar volume of sales resulting from the operations carried on at the New York office yearly?

A. I answered that before. I cannot do that.

Q. What work is done at 10 East 40th Street with respect to the purchase of raw materials.

A. Occasionally our office is visited by executives of our mill whose function it is to buy raw materials.

Q. Are those materials thus purchased sent down to these various factories that you have mentioned?

A. Yes, I imagine so.

Q. And used in the product which is made by those various mills?

A. Yes.

Q. Do you know whether in addition to the factories there is any other office of the Vanity Fair Silk Mills?

A. We have three branch offices run by three of our top salesmen as officers.

Q. Where are they located?

A. Los Angeles, California; Dallas, Texas, and Atlanta, Georgia.

Q. Where does the president of the company operate from?

A. Reading, Pennsylvania.

Q. Does he come to New York on occasion?

A. Yes.

Q. Is that a regular proceeding or is it infrequent?

A. Sporadically.

Q. When he comes to New York, does he operate out of 10 East 40th Street?

The Court: What do you mean by that question?

Q. When he is in New York on business, does he use the office at 10 East 40th Street?

A. He comes to the office at 10 East 40th Street.

[fol. 190] Q. Does he work there?

A. He uses it for conferences, yes, sir.

Q. Are all of your sales made from goods in stock or are the orders filled by manufacturing the specific goods sold?

A. Almost entirely, orders are filled from regular numbers which are either in stock or in process of being manufactured.

Q. Is any work at East 40th Street done with respect to forecasting the amount of sales to be anticipated?

A. That is a function of the sales department which is located at 10 East 40th Street.

Q. And do you supply that information of anticipated sales to the factory?

A. Yes.

Q. Do you know whether or not goods are manufactured at the factory based in part, at least, upon those estimates?

A. Theoretically.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. With respect to purchases of raw material for the mills, that is done entirely by the mill people, isn't it?

A. Yes, sir.

Q. That is not done by anybody on your staff, is it?

A. Correct.

Q. And for the most part, it has no connection at all with 10 East 40th Street?

A. Correct.

Q. What you meant was that occasionally a buyer might come to New York and just as a courtesy, or convenience, rather, use your office to talk to somebody to the effect that he was going to buy some raw materials?

A. I think you better use a different word than buyer, because a buyer who comes to our office does not necessarily come for the purchase of raw materials, he may just come to use our office as a convenience to hang his hat there, and that is about all.

[fol. 191] Q. That is sporadically and very occasionally?

A. Yes.

Q. I want to read a question and answer that you gave before: "Q. Do you sell from stock or do you manufacture pursuant to order?

A. We sell mostly from stock—99½ per cent from stock"; is that about right?

A. That is correct. I think what this gentleman meant before was whether we make sales from specifications. There are very few specifications even in normal times.

DOUGALL CHARLES FRASER, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Dougall Charles Fraser.

Q. And your address?

A. 83-26 Abingdon Road, Kew Gardens, Long Island.

Q. What concern are you connected with, Mr. Fraser?

A. I am employed by the Fraser Engineering Company.

Q. Has that company an office at 10 East 40th Street?

A. Yes.

Q. What business is that company in?

A. Engineering and construction work.

Q. What space does it occupy?

A. I believe 2300 square feet.

Mr. Proskauer: That is right. The suite is 4203.

Q. Does your company do any particular type of engineering or construction work?

A. Yes, we have four contracting arrangements with four firms on cost plus basis.

Q. Where are those firms located?

A. One in Missouri, two in Pennsylvania, one in Tennessee. One of the two in Pennsylvania is the manufacturing firm on a cost plus basis.

[fol. 192] Q. What do you mean by that?

A. The Government hires us as operators of this plant and we get paid on the basis of so many cents per pound.

The Court: For operating and supervising?

The Witness: Yes, everything is on a cost plus basis.

Q. What employees or officers of the company make their headquarters at 10 East 40th Street?

A. No officers. There are five employees. Myself and three girls and the engineer.

Q. Is there a drafting table at those premises?

A. Yes sir.

Q. Is that used by the engineer?

A. No.

Q. Who is it used by?

A. It is not used.

Q. Was it ever used?

A. Not by the Fraser Engineering Company.

Q. By the Filtration Equipment Corporation?

A. Yes.

Q. Were you connected with that corporation?

A. No.

Q. Is the Fraser Engineering Company in any way connected with that corporation?

A. No.

Q. What work is carried on at 10 East 40th Street by your company?

A. We handle the financing and insurance—you might say the business phases of the work.

Q. What is included under the heading of "business phases"?

A. We handle all the borrowing of money and the main banking is done in New York.

Q. Do I understand the financing of the job to be done in a State other than New York is done at the headquarters at 10 East 40th Street, is that a fair statement?

A. I don't know whether you would call it headquarters.

Q. Is the financing of these out-of-State jobs done through the 10 East 40th Street office?

A. Yes.

[fol. 193] By the Court:

Q. Have you any other office?

A. Yes, we have our principal office in New Hampshire and an office in Delaware.

Q. Where is the designing done?

A. On each job mainly and partially in the office at Delaware.

By Mr. Herwitz:

Q. Is any material purchased out of the office at 10 East 40th Street?

A. No.

Q. Is the accounting done for the firm at 10 East 40th Street?

A. Partially. The main part is designing the job.

Q. Some of the accounting is done at 10 East 40th Street?

A. Yes.

Q. What does the engineer do who works out of 10 East 40th Street?

A. He doesn't really do a great deal. Very little.

Q. Well, the little that he does, what is it that he does?

A. Well, he is an assistant expediting the job in New York.

Q. Expediting the construction of these jobs?

A. Speeding up deliveries of purchases of the company.

Q. Speeding up purchases?

A. Delivery of purchases.

Q. Where are those purchases made?

A. There is only one really, and that is in Brooklyn.

Q. Is the material purchased for this one or all of these jobs at some place in Brooklyn?

A. It is purchased from Meadville, Pennsylvania.

Q. What has Brooklyn got to do with it?

A. That is where the supply is to go.

Q. And the engineer has some connection with expediting and hurrying up the materials purchased in Brooklyn?

By the Court:

Q. Where was the purchase made from?

A. Pennsylvania. The order was sent from Pennsylvania by mail.

[fol. 194] Q. Was sent from where to Pennsylvania? That is what I want to know.

A. It originated in Pennsylvania, in our office in Pennsylvania.

Q. That is what I want to find out: You have an office in Pennsylvania?

A. Those are job offices.

Q. The purchase was made in Pennsylvania of a Meadville concern to be filled in Brooklyn, is that it?

A. The purchase was made from a Brooklyn concern.

By Mr. Herwitz:

Q. For delivery in Pennsylvania?

A. That is right.

Q. And the engineer at 10 East 40th Street works in expediting that order?

A. That is right.

Q. For the job in Pennsylvania, is that right?

A. Yes.

Q. Is that a typical function of an engineer?

Mr. Proskauer: I object to that as incompetent.

The Court: Sustained.

Mr. Herwitz: That is all.

By the Court:

Q. I suppose the engineer contacts the people to whom delivery is being made, to expedite delivery?

A. That is right.

By Mr. Proskauer:

Q. Is that a frequent occurrence?

A. No, sir.

[fol. 195] GEORGE T. LATIMER, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. George T. Latimer.

Q. And your address?

A. 126 Freemont Street, Harrison, New York.

Q. Are you connected with the S. S. White Dental Manufacturing Company?

A. Yes, I am.

Q. With offices at 10 East 40th Street?

A. That is correct.

By the Court:

Q. Have they any other office?

A. They have many other offices.

Q. Have they a plant at Staten Island?

A. Yes.

Q. Where is the main office?

A. The main office is in Philadelphia.

By Mr. Herwitz:

Q. What activities are carried on at 10 East 40th Street?

A. The sales activities of the Industrial Division only. We have no connection whatever with the dental end of the business.

Mr. Proskauer: The area is 1510 square feet, and the suite is No. 2308.

Q. What end of the business do you have?

A. Industrial only—everything other than dental.

Q. What does that mean?

A. Mainly it is the sale of flexible shafting.

Q. What does that mean?

A. Flexible shafting—you may recognize it as your speedometer shaft. Did you ever see a speedometer shaft in your automobile?

[fol. 196] Q. No, I haven't had an automobile for years.

A. That is what it is anyway.

Q. Where are these products manufactured?

A. They are manufactured at the plant at Staten Island.

Q. What constitutes your sales area?

A. All over the country.

Q. Do you make sales out of these premises at 10 East 40th Street to customers all over the country?

A. Yes, we do.

Q. What is the manner of selling, is it by personal contact or mail?

A. Mostly by personal contact by men who operate out of our office, that we go to see. Very few people come to see us.

Q. How many people work at 10 East 40th Street?

A. There are four people active in sales work and there are ten or eleven in the office itself.

Q. Are your salesmen attached at 10 East 40th Street?

A. They are sales engineers. They do a job of sales engineering, so-called.

Q. What do you mean by that?

A. Well, flexible shafting is adapted to a number of different uses. A man may have something with which he can use a flexible shafting in one of his devices, and having that, we get in touch with him or we send engineering data, and if a job develops, we may go out and help him with a design of a shaft for his particular use.

Q. Is any designing work by your sales engineers done at the premises at 10 East 40th Street?

A. Yes, to that extent.

Q. For purposes of selling?

A. Yes, to get a customer to buy our material.

Q. After the sale is made to the customer, do your sales engineers aid and assist the customer in the production?

A. I don't quite understand that.

Q. Question withdrawn. I think the question is bad. When a sale is made, the thing is actually manufactured at the [fol. 197] factory at Staten Island, is that correct?

A. That is correct.

Q. Do your sales engineers work at 10 East 40th Street and frequently consult with the factory at Staten Island concerning orders received and things to be made up there?

A. You cover an awful lot of ground by that question. I don't follow that.

The Court: He thinks it is quite a distance from 40th Street to Staten Island.

The Witness: We haven't much to do after the order is made and sent to the plant except to follow it up, we attend to that, or we might change specifications if the customer asks us to do it.

Q. In making a sale, you testified that your sales engineers would frequently make up a design which would be appropriate to the customer?

A. That is right.

Q. If the customer agrees that it is appropriate for the design, is that design given to the factory at Staten Island to fill the order?

A. In most cases. In some cases we have to call on the engineer in the plant to assist us in the design.

Q. Frequently the design is prepared at 10 East 40th Street?

A. That is right, and filled in that manner.

Q. And are products produced in that manner?

A. Yes.

Q. And you ship to customers all over the country outside of New York State?

A. That is right.

Q. Can you give us an estimate of the dollar value of sales of your company annually?

A. From the figures asked for in the subpoena, from November 1938 to June 1942, the figure is \$3,635,324.

Q. Have you a teletype machine in your office?

A. Yes, we have.

Q. With whom do you communicate by means of that [fol. 198] machine?

A. Mostly to Staten Island. In some instances out-of-town customers call in but not very often.

Q. Do you have a drafting table or tables at your office?

A. We do.

Q. How many?

A. One.

Q. For the purpose which you have described?

A. Used by us for that purpose.

By the Court:

Q. Is this shafting a patented article?

A. No, sir, it is not.

By Mr. Herwitz:

Q. Are there any other activities carried on from the premises 10 East 40th Street other than sales?

A. No, we do no billing and no accounting or anything of that sort.

Q. Do you do any purchasing?

A. No.

Q. At the offices located at 10 East 40th Street?

A. No.

Cross-examination.

By Mr. Proskauer:

Q. This shafting is sold to people who want to use it as part of machinery, I suppose, or something like that?

A. Yes.

Q. And what your engineer does is to go down and draw a design or something for those people and give them an idea how they can use your shafting in their machine, is that right?

A. Well, fairly so. You would have to tell them something about what the shaft would do rather than make a design of it. That is, the designing is secondary.

Q. The design really is not important?

A. It is secondary. The ability of the shaft to do the particular job that they have in mind is what we discuss with them.

[fol. 199] Q. Would this be right to say that the design which the engineer makes is secondary to his explanation to them of how they could use the shafting in their business?

A. Yes, I think that is true.

Q. And afterwards he uses the design as a sales argument with them, is that it?

A. Yes.

By the Court:

Q. He uses it to demonstrate it?

A. We don't do very much demonstrating. We don't have to make much of a sales effort only to let the fellow know that we can do the job for him.

By Mr. Proskauer:

Q. After you get the order from the fellow, what does he order, certain specifications or does he order it by this design?

A. He would order it either way. Some order to specific designs. There are a great many who order the bulk material, that is shafting in long lengths without any cuttings whatever added to it.

Mr. Proskauer: That is all.

Redirect examination.

By Mr. Herwitz:

Q. Whatever orders are received, the factory has to make up pursuant to those orders? They don't carry anything on hand; they don't have any in stock, do they?

A. No, essentially not.

Q. When an order is sent over to the factory, does it include a design describing what the factory is to make pursuant to the order?

A. That is correct.

Q. Is the design an accurate design?

A. Yes, it is a specification according to the design, that is correct.

[fol. 200] Q. And the factory does its work of producing the article directly pursuant to your design, is that it?

A. Yes, it may have been initiated at our office or may not.

Q. It frequently is?

A. It frequently is, yes.

By the Court:

Q. You gave the figure of \$3,635,000; does that represent sales made of this flexible shafting alone?

A. Sales out of 10 East 40th Street.

Q. Were all the products thus sold manufactured at Staten Island?

A. Essentially so, yes.

Q. Can you approximate what part of the deliveries were made in the State of New York and what approximately were out of the State of New York?

A. I could not do that accurately, your Honor.

Q. Have you any idea?

A. A figure I would say in excess of 75 per cent is sold out of the State.

MARTIN KORTJOHN, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name?

A. Martin Kortjohn.

Q. And your residence?

A. 52 Clinton Place, Bronx.

By the Court:

Q. Are you a member of any company?

A. I am a senior member of Martin Kortjohn & Company, certified public accountants.

Q. What is the room number of your suite?

A. 2805.

Q. What is the square footage?

Mr. Levin: 1,320 square feet.

[fol. 201] By Mr. Herwitz:

Q. Mr. Kortjohn, do you have clients for whom you work in New York State and out of New York State?

A. I have.

Q. How many men do you have working out of your office at 10 East 40th Street?

A. Well, I will have to explain that. First, some of the men have part time work with other companies, and as an incident to our operation, we have eight hired men besides three partners and three girls.

Q. What we would like to know, Mr. Kortjohn, generally, is the type of business that you carry on at those premises with respect to the business in New York State or out of New York State, will you tell us about that?

A. We have business both in New York State and out of New York State.

Q. Do you work for manufacturing companies outside of New York State?

A. Yes.

Q. And do your men go to various manufacturing plants and do certain types of accounting at those plants?

A. They do.

Q. Outside of New York State?

A. They do.

Q. Can you give us any idea of the proportion of work done by your firm in New York State and outside of New York?

A. I would say 18 per cent is out of New York State.

Q. And of the work done in New York State, is it done for firms which firms are engaged in business both in New York State and outside of New York State?

A. Yes.

Mr. Proskauer: I can raise a legal objection to that as irrelevant, but I won't do it.

Mr. Herwitz: I would like to get the facts without going too much into detail about his business.

The Court: Go ahead.

[Vol. 202] Q. Do you know whether any client that you represent or that you do work for are engaged in manufacturing merchandise which is shipped in substantial amount all over the country?

A. They are.

Q. Do you work for a number of big concerns doing such work?

A. That is right.

Q. Will you tell us what firms, without mentioning the name, what type of firms, the books of which you audit outside the State of New York?

A. A brick concern.

Q. Do you also do work for engineering concerns?

A. Yes.

Q. Doing construction jobs all over the country?

A. That is correct.

Q. Do you go to those jobs and audit those books for them at those places?

A. My associates do.

Q. And when work is done by some of the men working for you outside of New York, do they come back to New York with their working papers?

A. That is correct.

Q. And is the part of the work in connection with those jobs done in New York?

A. That is correct.

Q. And is the ultimate report—monthly report or annual report—of these production jobs or engineering jobs outside of New York done at the premises 10 East 40th Street?

A. That is correct.

Q. Can you give us any estimate in dollar volume of the work done outside of New York State with which your firm is concerned?

A. As I stated before, about 18 per cent as far as fees are concerned.

Mr. Proskauer: That is a pretty good index.

The Court: I imagine the fees are based on the dollar volume.

Mr. Proskauer: Mostly hours. I think.

Q. Do you maintain regular communication between yourself and your men when they are working outside of New York?

A. I do.

[fol. 203] Q. By what means is that communication maintained?

A. They send me time reports; they send me preliminary memorandums as to the progress of the work and naturally they send me their expense reports.

IRVING P. DONALDSON, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Please state your name.

A. Irving Price Donaldson.

Q. And your address?

A. 15 Bennett Place, Westfield, New Jersey.

Q. Are you connected with the Arkell Safety Bag Company, located at 10 East 40th Street?

A. I am.

Q. In what capacity?

A. I am the corporation secretary.

Mr. Proskauer: They occupy room 3110—2400 square feet; and an additional 110 square feet, room 2306A.

Q. What is a safety bag?

A. A safety bag is a lining for a bag, barrel or box.

Q. What work is carried on at 10 East 40th Street by your concern?

A. That is the executive and administrative offices of the company.

Q. Is it a manufacturing company?

A. It is.

Q. Where is the manufacturing done?

A. 67 North 11th Street, Brooklyn, and 6345 West 65th Street, Chicago.

Q. Do you know whether merchandise manufactured in Brooklyn is sold to customers all over the country?

A. Right.

Q. Outside of New York State?

A. It is.

Q. And is the same true with respect to the factory in Chicago, Illinois?

A. Yes.

[fol. 204] Q. Do you have any other offices?

A. No.

Q. 10 East 40th Street, Brooklyn and Chicago, is that correct?

A. That is right.

Q. Is the main office at 10 East 40th Street?

A. It is.

Q. What territory is covered—what sales territory is covered out of 10 East 40th Street?

A. The eastern part of the United States.

Q. How many salesmen are there working out of those premises?

A. We only have one or two now. We had as many as five or six before the draft.

Q. Tell us the manner and method of making sales, is it by personal contact?

A. The salesmen call on the customers and in most cases the orders are mailed in.

Q. To 10 East 40th Street?

A. Yes.

By the Court:

Q. How do you distinguish between sending an order to Brooklyn to be filled or sent to Chicago?

A. That depends on the destination of the shipment.

By Mr. Herwitz:

Q. Do I understand your orders from all over the country come in to 10 East 40th Street?

A. Well, some orders go directly to the Chicago office and are filled from there.

Mr. Proskauer: What is the difference, if we make no question that they do get orders at 10 East 40th Street?

Q. Is it determined by the executives located at 10 East 40th Street which factory shall produce the merchandise ordered?

Mr. Proskauer: I object to that as immaterial and irrelevant.

[fol. 205] The Court: I will allow it.

A. At times, yes. As I said before, those customers in the Middle West will automatically send their orders to the Chicago office and they are filled from there. Some orders come to New York and are forwarded to the Chicago office.

Q. Do you have a teletype at 10 East 40th Street?

A. Yes, sir.

Q. Are teletype messages sent to the Chicago office and the office in Brooklyn?

A. Yes.

Q. Will you tell us what is the nature of the messages going back and forth between 10 East 40th Street and Brooklyn and Chicago?

A. Most of them are complaints from customers for not receiving delivery in time, and they want to see if we cannot in turn communicate with the Chicago office to expedite the delivery.

Q. Is the office at 10 East 40th Street used to expedite production pursuant to such requests?

Mr. Proskauer: I object to that as incompetent and calling for a conclusion.

The Court: The objection is sustained.

Q. Are instructions given on teletype machines with respect to production?

Mr. Proskauer: I object to that as incompetent.

The Court: I will allow it.

Mr. Proskauer: I object specifically, your Honor, to the use of the word "instructions".

The Court: I will allow him to say yes or no; that is all the question calls for.

A. Yes.

Q. What instructions are given?

[fol. 206] The Court: I will exclude that. You may ask what is done with respect to the use of the teletype concerning production.

Mr. Herwitz: I will adopt that question; can you answer that?

The Witness: Will you re-read the question, please?

Q. What instruction or directions—

The Court: Leave out the instructions.

Q. What directions are given over this teletype machine with regard to production at Brooklyn and Chicago?

A. I can answer that better by saying that it is an interchange of ideas?

Q. Such as what, for example?

A. Depending upon manufacturing schedules.

By the Court:

Q. Does it relate to deliveries?

A. I beg your pardon?

Q. Do these things you talk about relate to deliveries?

A. All relate to deliveries.

By Mr. Herwitz:

Q. Does it relate at any time to the actual production?

A. Very seldom.

Q. Are financial arrangements made by the company connected with the factory in Chicago from the premises at 10 East 40th Street?

A. The executives offices of the company are at 10 East 40th Street. The president and vice-president are located there.

Q. Would that include making financial arrangements for loans and so forth, for the running of the Chicago plant?
[fol. 207] A. We have never had any occasion to do anything like that.

Q. I think on your examination before trial, you were asked about financial arrangements being made from 10 East 40th Street.

A. Not referring to loans.

Q. You were not the man who was examined?

A. I don't believe there is anything about loans there.

Q. What do you refer to when you speak of financial arrangements?

A. Method of payment.

Q. Anything else?

A. You would have to ask a question before I can answer that.

By the Court:

Q. What is your position with the company?

A. I am the secretary.

Q. I suppose you mean by financial arrangements the way the goods were to be manufactured, delivered and paid for?

A. Financial arrangements would not necessarily indicate that the concern had to borrow any money. They might have enough working capital or might even have a surplus.

By Mr. Herwitz:

Q. Can you tell us something about that? It is your business, not ours.

A. Policies regarding that would be established in New York.

Q. What else is done in New York in addition to what you have already told us?

By the Court:

Q. That is if any money was to be borrowed, it would be arranged here?

A. That is right.

Q. Do you recall any instance where this was done?

A. Yes, it was done in New York.

[fol. 208] By Mr. Herwitz:

Q. For the factory in Chicago?

A. No, not for the factory in Chicago.

Q. For the general business?

A. Right.

Q. And it would include the factory in Chicago?

A. Probably it would; yes.

Q. Is there a traffic department at 10 East 40th Street?

A. Yes.

Q. Who is the head of that?

A. Mr. Ulm.

Q. What does he do?

A. His duties are to see that the orders are properly routed from the Brooklyn plant.

Q. Or see that they are properly filled?

Mr. Proskauer: I object to that.

The Court: Sustained.

Q. Does Mr. Ulm make the arrangements for the means of transportation—railroad transportation and so forth?

A. In most cases the customers tell us that. That information is on the order and the orders indicate how they are to be routed.

Q. And if they don't, Mr. Ulm does?

A. He might look into that.

Q. And handle it, is that correct?

A. Yes.

Q. Can you give us an approximate estimation of the amount of merchandise handled by the company in the course of a year—volume of sales?

A. Dollar sales?

Q. Yes.

A. I would say they exceed a half million dollars.

Q. What proportion of those sales are shipped either from the factory in Brooklyn or the factory in Chicago to customers outside of the respective States in which those factories are located?

A. I am not in a position to give a definite answer on that.

Mr. Proskauer: Would it help if I said it is a very substantial proportion?

[fol. 209] Mr. Herwitz: I accept that concession.

Mr. Proskauer: Nobody is going to dispute the fact that these people are engaged in interstate commerce.

Mr. Herwitz: At 10 East 40th Street?

The Court: There you are putting something into the record that your opponent does not subscribe to.

Mr. Herwitz: I am inquiring.

Mr. Proskauer: You have your answer. You can infer it from the Judge's comment.

Q. Do you have any mimeograph machines at 10 East 40th Street?

A. We do have one.

Q. What do you use that for?

A. Well, making up forms.

Q. Forms for what?

A. General use around the office.

Q. Do you send out circulars to your customers?

A. Once in a while.

Q. When you do that, do you use the mimeograph in the office for making up those circulars?

A. Yes.

Q. Do you handle advertisements in the office at 10 East 40th Street?

A. We don't do very much advertising. We have a listing in one or two trade papers.

Q. Do you mail advertising?

A. Direct mail—sending letters.

Q. Do you do that from 10 East 40th Street?

A. Yes.

Q. Do you mail those to customers or prospective customers outside of New York State?

A. All over the United States.

Q. And do these trade papers in which you advertise have circulation all over the United States?

A. They do.

Q. Who prepares the copy to be inserted in those advertisements?

A. Well, it might be the sales manager or it might be myself. There isn't very much to that; very little is done.

[fol. 210] Q. Well, whatever part is done is done at 10 East 40th Street, is that right?

A. That is right.

Q. Is it true to state that 95 per cent of the product you manufacture is made to order?

A. Right.

Q. Is there a purchasing department at 10 East 40th Street?

A. Right.

Q. Are materials purchased which go into manufacture of these products at Brooklyn and at Chicago?

A. Yes.

Q. Do you negotiate those contracts for those purchases at 10 East 40th Street?

A. We do.

Q. As a result of those purchases, is raw material sent from the point of origin across state lines either to Brooklyn or to Chicago?

A. Correct.

Q. Do you also purchase equipment from time to time to be used at the factory in Brooklyn and at the factory in Chicago from the premises at 10 East 40th Street?

A. We do.

Q. Do you handle the placement of insurance for the equipment for the plant?

A. We do.

Q. Both in Brooklyn and Chicago?

A. We do.

Q. Does your traffic department arrange for a consolidation of small shipments so as to be included in carload quantities from your various plants?

A. We only have two plants.

Q. From those two plants?

A. I don't see how they can consolidate many, but they might occasionally.

Q. Do you have a small storeroom at 10 East 40th Street?

A. Very small, yes.

Q. On the 7th floor?

A. That is right.

Q. What do you store there?

A. Stationery.

[fol 211] JULIAN S. JACOBS, called as a witness on on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Julian S. Jacobs.

Q. And your residence?

A. 25 West 64th Street, New York City.

Q. What business are you in, sir?

A. Promoting and conducting the Textile Research Institute.

Q. What premises do you occupy?

A. 2701, 10 East 40th Street.

Mr. Proskauer: 770 square feet, your Honor.

Q. Will you tell us what that business is exactly?

A. Our work, since we have been in that building has been one largely of organizing. We have working arrangements with the Textile Foundation and it was organized along the lines of the Chemical Foundation. We have research laboratories in St. Louis and in Washington; we have a research director and have 16 scientists connected with it. The research director of the Textile Foundation is our director of research and the research we carry on is conducted by that organization, and at the present time we are mostly engaged in war work, but we have one co-operative research of product going on that involves the large rayon producers, and some of the chemical concerns and some of the larger mills engaged in the study of rayon. That is the only commercial product that we are working on. That is all carried on in Washington. The business conducted in New York is entirely administrative. We do not buy or sell, and we are a non-profit organization. If that answers your question?

Q. I am afraid it may.

A. We are a membership organization. Our members are of three classes, sustaining, company and individual. The sustaining membership may be anything up to, well, [fol. 212] we have one up to \$10,000; the company membership is \$100 and individual memberships \$10.

Q. And are members of this institute textile mills?

A. Textile mills and chemical concerns—people that are related in one way or another with the textile industry.

Q. And are these member mills having mills in states other than New York State?

A. Oh, yes, certainly; all over the East and South.

Q. And is it the purpose of your organization, among others, to make a research into different uses to be made of textiles or different forms of textiles?

A. Yes; and to promote the growth and increase in the textile industry, in which the textile industry has been somewhat backward. We are trying to organize an educational plan now for higher education in the textile field, in technology and science which is to carry up to a master's or doctor's degrees.

Q. Let me ask you what activities are carried on at 10 East 40th Street particularly?

A. Well, the membership has correspondence with mills, —the most of the consulting on mill problems, research problems, which go direct to Washington. If they come in they are passed along there. We do not give them a consulting service, but that is handled at the Bureau of Standards in Washington.

Q. Is the work at 10 East 40th Street the matter of getting backing and support for the Institute?

A. That partly; and organizing a plan which we have under way, and that is promoted in our editorial office.

Q. Do you put out a magazine?

A. Yes, we put out a magazine for our members.

Q. Is that prepared at 10 East 40th Street?

A. That is prepared at 10 East 40th Street.

Q. Have you brought a sample with you?

A. Yes.

Mr. Herwitz: I ask that that be marked for identification.

[fol. 213] (Marked Plaintiffs' Exhibit 23 for Identification.)

The Witness: That and other various other technical reports. For instance, we put out a small chart devoted to the study of mildew-proof military cloth.

Q. Is the result of the work carried on at 10 East 40th Street sent to the members all over the country?

A. Yes.

Q. And is this magazine entitled "Textile Research," Plaintiffs' Exhibit 23 for Identification, sent to members all over the country?

A. That is sent to members and also to all the principal libraries in the country and most of the large educational institutions.

Mr. Proskauer: He said it was prepared there.

The Witness: It was printed in Lancaster, Pennsylvania, and mailed from Lancaster.

The Court: It contains certain suggestions?

The Witness: It contains reports. For instance, the report has a 21-page report on certain phases of textile matter; there are technical reports as well as non-technical matter, and it discusses several scientific questions.

The Court: Is there a charge made for it?

The Witness: No charge; it is part of the membership privilege.

By Mr. Herwitz:

Q. How many members are there?

A. I cannot recollect. I see that is one thing they omitted from this. I think we have 150 company and about 125 individuals, and three of the large sustaining members. We put out around 700 copies.

Q. Plaintiffs' Exhibit 23 for Identification contains diagrams; Let me ask you whether or not you know where [fol. 214] these diagrams were prepared?

A. Those diagrams were prepared in Washington.

Q. Before they were included in this magazine, were they seen by anybody at 10 East 40th Street?

A. Oh, yes, I happen to be editor of the magazine and assistant to the president. That all comes through my hands, and I get out some diagrams, rewrite a good deal of the stuff, and write some of the material, and I check everything.

Q. Do you change some of the diagrams occasionally?

A. Very seldom. No, I might say I never do. If they are changed they are changed by the printer under my direction.

Q. Would those directions be done on matter made by you at 10 East 40th Street?

A. That is right.

Q. Which would be sent—that is, the result of your work at 10 East 40th Street would be sent to the printer in Pennsylvania?

The Court: He already told us, and the printer sends it out to the people to whom they are directed.

HERBERT R. MORSS, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Herbert R. Morss.

Q. And your address?

A. 553 Seminary Avenue, Rahway, New Jersey.

Q. Are you connected with any office at premises 10 East 40th Street?

A. I am the New York representative of Blackington & Company and H. R. Morss & Company.

Q. Are you located in that representation at 10 East 40th Street?

A. Yes.

Q. What room?

A. Room 1903.

[fol. 215] Mr. Levin: 980 square feet, your Honor.

Q. What product is manufactured by the Blackington Company?

A. Fine silverware and leather products.

Q. Where is the factory located?

A. Near Attleboro, Mass.

Q. Is that H. R. Morss & Company?

A. That is part of Blackington & Company.

Q. What work is done by you at 10 East 40th Street?

A. It is a sales office strictly.

Q. How many people are employed there?

A. One besides myself now.

Q. And how is the sales work done?

A. We carry a line of samples there and orders are taken from that line of samples and made up at our factory at Attleboro, Mass., and shipments are made from there.

Q. Do your customers come to your place of business or do you go out?

A. Some customers come there and we have men soliciting on the road.

Q. Are there other sales offices of the Blackington Company or is that the only one?

A. This is the only sales office. The main office is at North Attleboro.

Q. At the office at 10 East 40th Street are sales made frequently?

A. As they come into New York; yes.

Q. That means some come to New York and some come to Massachusetts, is that what you mean?

A. You asked me if they are made all over the country. If a customer comes to New York, he would select his goods in New York, otherwise our Chicago representative would see him when we have a Chicago representative—just now we haven't.

Q. Do you sell goods out of the office at 10 East 40th Street throughout the United States?

A. Yes.

Q. What is the dollar value of your sales approximately?

A. I should say out of that office \$100,000.

Q. A year?

A. That is including all over the country.

[fol. 216] By the Court:

Q. Does that include solicitors on the road?

A. No, that would include what that office does to out of town trade calling at that office.

Q. Are there salesmen who are traveling for the company working out of New York?

A. One silver man; the rest work at the factory.

Q. In that \$100,000 figure do you include the sales made by this one salesman?

A. No, I don't.

Q. What would the volume of your sales be if you included that?

A. Let me see. Last year he sold \$50,000. That is to be added to the figure I gave you.

Q. What proportion of the sales volume would be made to customers outside of New York State?

A. I should say 60 to 75 per cent.

Q. I presume that the customers are customers outside of Massachusetts where the factory is located?

A. Yes, probably from the West.

Q. Do you have any factory in Providence?

A. No.

Q. Just in Attleboro, Mass?

A. North Attleboro, Mass.

Q. Do you have a teletype machine?

A. No.

Q. Do you have any communication with the factory?

A. Correspondence and telephone communication.

Q. Do you maintain correspondence with your factory?

A. Yes.

Q. Are your products made from order or are they on hand?

A. Well now, let me answer that in this way. We carry a sample line. We might have a stock of some merchandise, and if the stock is available, we make out the order from that. The sample line constitutes what we will make.

Q. Sometimes it will have to be made for delivery, sometimes it is available in the factory?

A. That is right.

[fol. 217] By the Court:

Q. Does its silver representative turn his business over to the New York office?

A. No; he mails it to the factory.

Q. Where is he paid from?

A. From the factory. All bills are paid from the factory except incidentals like telephone bills.

Q. Who hired him?

A. Who hired him? He was doing work for me in the New York office and I put him on the road from the New York office.

Mr. Herwitz: That is all.

WILLIAM R. ROLLKA, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name.

A. William A. Rollka.

Q. And your address?

A. Teaneck, New Jersey.

Q. With what firm are you connected?

A. The Chase Brass & Copper Company. That is, I am not connected with them; I represent them.

Mr. Proskauer: They occupy the 45th through 48th floors and also part of the 44th floor, and the total area is 12,155 square feet.

Q. Are you an attorney?

A. That is right.

Q. You represent that company?

A. Yes.

Q. Are you familiar with the business of this company at 10 East 40th Street?

A. I am somewhat familiar with it, yes.

Q. Will you tell us first what business the Chase Brass & Copper Company is in?

[fol. 218] By the Court:

Q. Do you maintain your office at that space at 10 East 40th Street?

A. No, I do not.

Q. Where is your office?

A. 51 East 42nd Street.

Q. In what respect do you represent them, in a legal way?

A. In a legal way.

Mr. Proskauer: You have no objection if I make this statement, that they manufacture fixtures and sell lighting fixtures, brass and copper. If you want these items, brass, copper, chromium novelties, which are manufactured at Waterbury, Connecticut.

The Witness: That is right.

By Mr. Herwitz:

Q. And the products when manufactured are then shipped to customers outside of the state where they are manufactured?

A. That is right.

Q. I have here on page 10 a chart showing the amount of these sales for the years 1938, 1939, 1940, 1941 and 1942; will you state for the record—

Mr. Proskauer: I will state for the record, if you want that in, I will concede it.

Mr. Herwitz: I ask that the question I have marked in pencil on page 10 of the document marked for identification Plaintiffs' Exhibit 24 be copied into the record.

The Court: All right.

"Q. Do you know the approximate amount in dollars of the sales of the various Divisions pursuant to orders received during 1939, 1940, 1941 and 1942 which went through 10 East 40th Street, New York City?

[fol. 219] A. The figures are, by years and divisions, approximately as follows:

		1938	1939	1940	1941	1942
Specialty Sales	—over	125,000	125,000	150,000	150,000	25,000
Lighting Fixtures	—over	50,000	50,000	75,000	75,000	25,000
Containers and						
Closures	—over	250,000	400,000	650,000	700,000	500,000
Plumbing	—over	50,000	75,000	25,000	75,000	25,000
Manufacturing	—over	350,000	375,000	400,000	600,000	400,000
	over	825,000	1,025,000	1,300,000	1,600,000	975,000

Cross-examination.

By Mr. Proskauer:

Q. These premises are a showroom at 10 East 40th Street, are they not?

A. Well, one part of them was a showroom.

Q. You don't do any manufacturing there?

A. No manufacturing.

Q. And you don't do any buying there for the factory?

A. No buying.

Q. You don't send out any catalogues or pamphlets or advertising material which are prepared at that office?

A. I think we did send out a catalogue at one time. My note states nothing was sent out from the office but some catalogues.

Q. Where were those catalogues prepared, up at the factory?

A. They were prepared up at Waterbury.

Q. You just mailed some out from your office?

A. I might clarify that. The material or a part of it may have been prepared at 10 East 40th Street, but they

were put together and printed and sent down to 10 East 40th Street from Waterbury.

Mr. Proskauer: That is all.

Re-direct examination.

By Mr. Herwitz:

Q. What is the territory within which they operate at 10 East 40th Street?

A. They sell all over the United States.

[fol. 220] JULIAN COHEN, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. What is your name?

A. Julian Cohen.

Q. Where do you live?

A. Harbisdale, New York.

Q. You work at 10 East 40th Street?

A. From time to time.

Q. With what concern are you connected?

A. I am an accountant for Radio Patents Corporation.

Q. You are an accountant, you say?

A. Yes.

Q. What space do they occupy?

A. They occupy a part of the 44th floor.

Q. Is that the firm with which William Dubilier is president?

A. That is correct.

Q. He is in Florida, I understand?

A. That is right.

Q. And you are coming here in his stead?

A. Correct.

Q. Will you tell us what business Radio Patents, Inc. is in?

A. They are engaged in the business of developing patents—developing applications, prosecuting a patent through the Patent Office and finally producing the patent.

Q. You are a patent solicitor?

A. I would not call that a patent solicitor.

The Court: They are patent developers.

The Witness: Patent developers, that is right.

Q. Do the inventors come to you, is that correct?

A. Inventors will come to them with the idea of that they will prosecute their patent through the Patent Office, and they will see that it gets proper attention and will be properly prosecuted.

Q. Do you know whether your office was working for New York inventors or inventors all over the country?

[fol. 221] A. Well, they definitely were not restricting themselves to New York patentees.

Q. Do you know whether they do business with persons in other states in connection with this work?

A. I am not too sure about their status, but I do know they work with inventors in other countries.

Mr. Proskauer: The area of that space is 1025 square feet.

Q. Do they correspond with inventors in other countries with whom they have business?

A. That is correct.

Q. Regularly and continuously?

The Court: Not now probably.

A. Not now. Since the war, of course, that is out.

Q. There is a great deal of correspondence between your office at 10 East 40th Street and with the officials of the Patent Office, I take it?

A. Of course.

Q. Is that frequent?

A. Frequent.

Q. Do the tenants who occupy that space make frequent trips between New York and Washington in connection with this work?

A. They do.

Q. Is there frequent correspondence by mail between New York and Washington?

A. Yes.

Q. And passing through the intermediary states, of course?

A. Yes.

By the Court:

Q. Is there any attorney connected with the Radio Patent Company at 10 East 40th Street?

A. General counsel, or patent attorney?

Q. Patent attorney. I mean any patent attorney having an office at that address?

A. No.

[fol. 222] The Court: I know what these people do. You take a man who has an idea that he wants to patent, and he does not always know how to go about it. He goes to a concern like the Radio Patents Company and they help him get the patent in shape and they turn it over to a patent lawyer, sometimes they have such a man in their employ in the office and sometimes they turn it over to a patent lawyer in Washington—preferably to Washington, because that man is available to the Patent Office, because he can sit down with the Examiner and discuss the question which the Examiner may raise in the course of the application.

Mr. Proskauer: I will take that as a complete concession and I will concede that these people do exactly what the Judge has just said.

Mr. Herwitz: May I inquire in addition to that?

Mr. Proskauer: Then I withdraw the concession.

Mr. Herwitz: I will accept it.

STANLEY FULLWOOD, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Stanley Fullwood.

Q. And your address?

A. Bronxville, New York.

Q. Are you in business at 10 East 40th Street?

A. Yes, sir.

Q. With what firm are you connected?

A. I am in business for myself.

Q: What business are you in?

A. I am a factor sales agent.

[fol. 223] Q: What space do you occupy?

A: Room 4106.

Mr. Levin: 245 square feet.

Q: How long have you been in business, Mr. Fullwood?

A. Since February 1, 1933, in that office.

Q: Will you describe generally the method of operation of your business there.

A. Yes. I am a sales agent for a smelter concern in Texas, also a company in England. I sell antimony metal and antimony oxide.

Q: To whom do you sell these products?

A. Well, anybody who wants to buy them.

Q: In what locality?

A. All over the country.

Q: What method do you use to contact your prospects?

A. Well, I do some traveling, and we also deal by telephone and mail.

Q: You travel all over the country, do you?

A. Well, I have not done much traveling lately. The business is more or less a narrow business, and our customers have been known to us for years.

Mr. Proskauer: I am willing to stipulate that as a factor's agent he sells in interstate commerce.

The Court: Is that accepted?

Mr. Herwitz: Yes, I accept that.

Q: What is the annual total volume of your business?

A. I only got the subpoena at 5 o'clock last night, and I only had time to run off some figures. They asked for the figures from October 31, 1941, to and including June 31, 1942. That figure is \$6,636,670 and some cents.

By Mr. Proskauer:

Q: That is the amount of your sales?

A. That is the amount of our sales.

[fol. 224] By the Court:

Q: Not your commission?

A. I am sorry to say, no.

By Mr. Herwitz:

Q. When you make a sale to a customer do you have anything to do with the manner of shipments, that is, do you give instructions as to the manner by which the shipment shall be made?

A. The customer buying the goods gives us shipping instructions and I follow that.

Mr. Proskauer: What is the good of my conceding that his selling is done in interstate commerce?

The Court: I don't know. All right, go ahead and pile up a lot of unessential details.

Q. Do you have anything to do with making out bills of lading?

A. Only on consignment stocks in warehouse.

Q. Do you do that in connection with your business?

A. I do that in connection with my business.

JOHN F. YEWELL, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you please state your name?

A. John Floyd Yewell.

Q. What is your address?

A. Beacon Hill, Port Washington, Long Island.

Q. What business are you in, Mr. Yewell?

A. I am an architectural artist.

Q. Are you located at 10 East 40th Street?

A. Yes, sir.

[fol. 225] Q. What space do you occupy there?

A. Room 3703.

Mr. Levin: 215 square feet.

Q. Did I understand you to say that you were an architect?

A. Architectural artist and architect. I have a license to practice.

Q. Will you tell us exactly how you conduct your business at those premises? What does the term architectural artist mean?

A. It means that I receive blueprints from architects, magazines or advertising agencies and carry out instructions as to the type of picture that they want made for the architectural subject.

Q. What I understand you do is to make a drawing or painting of a proposed construction showing the final building to be completed, is that correct?

A. That is right.

Q. What uses are made of your work?

A. When an architect submits a drawing to a client or advertiser, he generally uses for reproduction possibilities such pictures, and the magazine generally calls for a drawing which they will publish.

Q. Do you do work for specific magazines?

A. I am not signed up by any particular magazine, but I do work for several magazines.

Q. More or less regularly?

A. Some years it is regular and some years it is very irregular.

Q. Do these magazines have a national circulation?

A. Well, one is the Ladies Home Journal.

Mr. Proskauer: I will concede that that has a national circulation.

Q. Do you work more or less regularly for the Ladies Home Journal?

A. No, not regularly, which would mean each month to be employed by them.

Q. Tell me how frequently you work for them?

A. Possibly about two drawings a year, sometimes more.

[fol. 226] Q. How many magazines, in total, do you work for in the course of a year?

A. Sometimes three, sometimes four, depending.

Q. Have you brought with you samples of the work you do?

A. Not for magazines.

Q. In addition to the magazine work, do you work for architects?

A. Yes.

Q. Are these architects in New York State or outside of New York State?

A. Well, they are all over the United States, as far as New Orleans or Baltimore.

Q. Do you send your work from the premises 10 East 40th Street to these architects all over the country?

A. Yes. That is, I take them down to the express office.

Q. You carry them down the elevator and then carry them to the express office and mail them from there, is that it?

A. Yes.

Q. Do you maintain regular and continuous communication with architects all over the country for whom you work?

A. Whenever I am working for them, I communicate with them.

Q. In addition to working for magazines and for architects as you have described, is there any other phase of your work?

A. I am a licensed architect in two states, New York and New Jersey.

Q. Do you practice in New Jersey too?

A. I have been working in New Jersey.

Q. Do you have an office in New Jersey?

A. No, sir.

Q. Do you make blueprints at your office 10 East 40th Street?

A. No, sir.

Q. You make pictures after the blueprint has been submitted to you, is that correct?

A. That is right.

Q. Do you have any connection with the Kincaid Manufacturing Company?

A. I have designed a building for them. It has not been built yet.

Q. Is that company in New Jersey?

A. Yes.

[fol. 227] Cross-examination.

By Mr. Proskauer:

Q. You make these drawings yourself, I suppose, don't you?

A. The drawings for architectural work are made downtown in another office and sent to me from that office.

Q. The work that you do as an architectural artist, you do yourself, is that right?

A. Yes, sir.

Q. It is entirely personal to you?

A. That is right.

Q. How many of those do you make a year, that is the things that you do personally as an artist?

A. All of the work is of a personal nature in that office; there are about 50 drawings a year.

Q. And those are all made by you and sent out to your customers either for reproduction in the magazine or for use by the client or some similar purpose?

A. That is right.

ERNST WOTTITZ, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name.

A. Ernst Wottitz.

Q. Where do you reside?

A. 34 Seaman Avenue, New York City.

Q. Are you connected with the Lessman Interiors?

A. Yes, I am an employee of that firm.

Q. How long have you been connected with that firm?

A. 4½ years.

Q. Are you familiar with the general operation of the business of that firm?

A. Yes.

Q. What space does that company occupy at 10 East 40th Street?

A. Room 1610.

Mr. Levin: 1000 square feet.

[fol. 228] Q. How many regular employees are there connected with the firm?

A. That depends always on the business. If business is better than it is now, we employ more; the last year I was the only one.

By the Court:

Q. What was the largest number employed in the last four years altogether?

A. Altogether I would say five.

Q. Will you tell us what the business of Lessman Interiors is.

A. Yes; we are designers and contract for hotels, mostly restaurant bars and private home interiors.

Q. And do you do this work for customers both, in New York and outside of New York?

A. Yes.

By the Court:

Q. Can you tell us how much of that work is done for people in New York State and how much for people out of New York State, what proportion?

A. I would say in the last year there was only one job outside of New York City. In other years it is maybe 60 to 40 per cent.

Q. Where is the 60 per cent?

A. 60 per cent in New York and 40 per cent outside. It changes from year to year, of course.

Mr. Proskauer: Is he talking of New York City or New York State?

The Court: I am referring to New York State.

The Witness: New York State would be the same as New York City.

By Mr. Herwitz:

Q. What work is done on the premises at 10 East 40th Street?

A. Just designing.

[fol. 229] Q. Does that mean the making of blueprints?

A. No, not the making of blueprints, we are making the tracings. The blueprints are made in a blueprint office.

Q. So you made the original tracing from which the blueprints are made?

A. That is correct.

Q. When you have a job, whether it is in New York or outside of New York, is that job done pursuant to the tracings, would you say, or the plan drawn up at the office at 10 East 40th Street?

By the Court:

Q. Does your office produce the work and prepare the plan?

A. Sometimes; not always, but mostly.

By Mr. Herwitz:

Q. When you have jobs outside of New York, who arranges for the personnel to do the job?

A. Mostly the owner. We are just doing the supervising.

Q. When you have jobs out of New York, is it necessary for some member of your organization to visit the place where the job is being done?

A. Yes.

Q. When that occurs, is there more or less regular communication between the office and the person on the job?

A. I would say, yes.

Q. And is that communication maintained by telephone and by mail?

A. Telephone, mail and going out on the job and supervising the job.

Q. Are there any arrangements made for the purchase of materials to be used on the job?

A. Yes.

Q. Are materials sometimes purchased in New York and shipped out of New York to the job itself?

A. Yes.

Q. And is that purchasing done at the premises 10 East 40th Street?

A. So far as the correspondence is concerned, we don't produce anything. We do not ship right from the office.

[fol. 230] Q. I understand. When you make a purchase of materials, do you make that sometimes or from time to time in the premises 10 East 40th Street?

The Court: He doesn't understand that question. Let me ask you, do you send out the orders or requisitions from 10 East 40th Street to the persons from whom you are seeking purchases?

The Witness: Yes.

The Court: He does not make the purchases at 10 East 40th Street. The purchases are made at the point where the man has the merchandise to sell.

The Witness: That is right.

The Court: But the order emanates from 10 East 40th Street and it winds up probably in the place of business of the consumer. That was not your question.

Mr. Herwitz: I will accept it.

Mr. Proskauer: I will accept it too.

Q. Are negotiations for the purchase of material conducted at 10 East 40th Street?

A. Yes.

Q. And as a result of those negotiations from time to time, is the merchandise sent from New York State to the job site outside of New York State?

A. Yes.

Q. Does the business of Lessman Interiors in the course of a year exceed \$75,000 on an average, if you know?

A. In a very good year, yes. I would not say last year.

By Mr. Proskauer:

Q. You don't mean those are commissions, do you?

A. No, that is the volume of the business.

Mr. Herwitz: That is all.

Mr. Proskauer: No questions.

[fol. 231] Your Honor, may I ask the witness a question? Will you come back, please?

By Mr. Proskauer:

Q. How many people do you have making these designs?

A. Just now only one.

Q. And in good times how many do you have?

A. In good times, two years ago—

The Court: He said five.

The Witness: For designing only three.

Q. I meant just for designing.

A. In good times three.

Q. How much space do those three designers occupy?

A. Just one room.

Q. And what is about the area of that room?

A. The drafting room is about I should say 20 feet by 8, or 160 square feet.

BERT V. TIBLIN, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name.

A. Bert V. Tiblin.

Q. And your address?

A. 8333 63rd Avenue, Elmhurst, New York.

Q. Do you work at 10 East 40th Street?

A. I do.

Q. With what company are you connected?

A. The Perolin Company of New York.

Q. What space do you occupy?

A. 2105 and 2003.

Q. Is there approximately 1,450 square feet in the space 2105?

A. Right.

Mr. Levin: That is right.

[fol. 232] Q. And is there 540 square feet in room 2003?

A. Yes.

Q. What business is your company in?

A. Manufacturing chemists.

Q. Where is the manufacturing done?

A. In Chicago.

Q. And are the products of the company manufactured at Chicago and delivered to customers all over the country?

A. Yes.

Q. What activities are carried on at the office at 10 East 40th Street?

A. The sales activities. It is the sales department.

Q. And what is the area within which the employees of the Perolin Company work out of that building?

A. New England and the Atlantic Coast states.

Q. How many salesmen are there connected with the company?

A. There aren't many salesmen; mostly jobbers; about four or five salesmen, I would say five salesmen.

Q. Are there jobbers connected with the company, do you mean?

A. No, we sell to jobbers.

Q. Where do these jobbers have their offices?

Mr. Proskauer: All over.

The Witness: In New England and the North Atlantic States.

Q. When these sales are made, are arrangements made for shipping of the merchandise from the factory in Chicago?

A. Yes.

Q. Are shipping instructions given by the customers and transmitted by you to the main office?

A. Yes.

By the Court:

Q. Is any stock kept at 10 East 40th Street?

A. Only a few samples.

Q. Do you have any warehouse in New York City?

A. We maintain a little stock in Brooklyn.

[fol. 233] By Mr. Herwitz:

Q. From time to time are shipments made to your customers outside of New York State from that warehouse in New York City?

A. Yes.

Q. What is the approximate annual volume of business done out of the New York office?

A. Approximately \$125,000.

Q. Do you have any teletype machines?

A. No.

Q. Do you maintain constant communication between the office at 10 East 40th Street and the factory in Chicago?

A. Yes.

Q. By what means are those communications maintained?

A. By mail, telephone and telegraph.

Q. Are your products made to order or are they on hand usually?

A. They are on hand—nothing special.

Q. Does the office at 10 East 40th Street prepare any estimates of sales in the future, which they supply the factory?

A. Yes.

Q. And what is the purpose of that?

A. The purpose is to keep a proper inventory.

Q. By that do you mean to give them an idea of the amount of the merchandise that they should produce?

Mr. Proskauer: I object to that as leading and not what the witness said at all.

The Court: Sustained.

Q. Can you give me—

The Court: I suggest that you let the witness testify.

Mr. Herwitz: I will abide by that, your Honor.

Q. What did you mean when you said that these estimates were given for the purpose of inventory? Will you [fol. 234] explain that, please.

A. To enable the Chicago factory to know how much business is anticipated and to carry a proper supply of our ingredients.

Q. Are there bulletins sent out to your customers from your office at 10 East 40th Street?

A. Are bulletins sent out?

Q. Yes.

A. Yes, advertising matter.

Q. Where is that advertising matter prepared?

A. Various New York printers.

By the Court:

Q. Where is the copy made up?

Mr. Proskauer: Who writes it?

A. I generally initiate the copy and we have an artist make the layout and we have the offset printed and sent out to the typographer.

Q. Does that artist have his place of business at 10 East 40th Street?

A. No.

Q. In other words, you initiate and send it out, is that it?

A. I have an artist, and tell him what we want done, and he makes the layout.

Q. Then it goes to the printer?

A. Yes.

Q. Then it comes back to you or your firm from the printer?

A. It come back for our O. K. and then he goes ahead.

Q. Who does the mailing?

A. It is mostly delivered either to New York or Chicago office in bulk, and is distributed among our salesmen. We send that out all during the year.

By Mr. Herwitz:

Q. To your customers all over the country?

A. Customers and mostly prospects.

[fol. 235] Q. Is there any purchasing done at the office 10 East 40th Street?

A. No, the purchases are made at the Chicago factory.

Q. The office at 10 East 40th Street is confined to selling?

A. And with buying advertising.

Q. And the purchase of advertising?

A. That is right.

Q. For the whole country?

A. Yes.

Q. Do you have any advertising in any national magazines?

A. No.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. And this advertising, it is confined simply to what you would call bulletins?

A. Principally, yes.

Q. How many different bulletins do you get out in a year?

A. We have our stock bulletins which we reissue whenever the stock gets low. I suppose we have altogether 15 types.

Q. You get out about 15 of them a year?

A. I would not say that. We maintain a supply of 15 different types of bulletins.

Q. That is what I mean. Those are held over from year to year, as they are standard?

A. Yes.

Q. How many new ones do you work on a year, would you say?

A. One or two a year to replace old ones.

Q. As to this bulletin work that you talk about that you send out once or twice a year, you write copy for the new bulletin and have it produced outside of your place, is that so?

A. That is the bulk of it, yes. They do some direct mail advertising, too.

By the Court:

Q. Or you may reprint an old standard type bulletin when your supply is getting low?

A. That is right.

[fol. 236] By Mr. Proskauer:

Q. That is of course done outside of your office?

A. Yes.

Mr. Proskauer: That is all.

Redirect examination.

By Mr. Herwitz:

Q. What is the total circulation of these various bulletins during the course of a year, if you know?

A. Well, you cannot call it that—

The Court: He means how many bulletins do you distribute in a year or pass out, approximately.

The Witness: Of all type perhaps 100,000.

Q. Of those 100,000 how many emanate from the office 10 East 40th Street?

A. About 40 per cent.

PHILIP S. JACOWER, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Philip S. Jacower.

Q. And where do you reside?

A. 975 Walton Avenue, Bronx.

Q. Do you have offices at 10 East 40th Street?

A. Yes.

Q. What space do you occupy?

A. We have a small part in the offices of the Chase Brass & Copper Company.

Q. What floor is that?

A. The 45th.

Q. How many feet do you occupy in that space?

A. Oh, I would say 16 by 30 or 14 by 30—just a small space.

Q. What business are you in?

A. We wholesale metal, glass and plastic items.

[fol. 237] Q. What is the name of your company?

A. D'Art Craftsman Corporation.

Q. Are your customers both in New York and outside of New York?

A. Yes.

By the Court:

Q. Where are your products manufactured?

A. Waterbury.

Q. Is your concern a subsidiary or affiliated with the Chase Brass & Copper concern?

A. No, it is an independent company.

By Mr. Herwitz:

Q. You have your merchandise manufactured by them, is that correct?

A. We have our merchandise manufactured in the Chase plant.

Q. What method do you use in selling your product?

A. Mostly the mails.

Q. Do you advertise your product by mail, is that what I understand?

A. Yes.

Q. You send out circulars from your premises?

A. Yes, we do.

Q. Who writes the copy for those circulars?

A. Our printer.

Q. The printer writes the copy?

A. Yes, the printer writes the copy. He consults with us about the copy, but he usually gets up the whole circular for us. He makes the photographs and layouts. He is quite clever at this business. We usually tell him what we want to sell, and he does the job for us.

Q. Are those consultations with regard to this printing matter held at 10 East 40th Street?

A. Yes.

Q. Is this advertising matter sent out in great bulk?

A. Well, it is sent out to selected trades.

[fol. 238] Q. About how many in the course of a year is the number of pieces that you send out?

A. We would send out on an average, I would say, somewhere between 5,000 and 10,000.

Q. A year?

A. Per year.

Q. And do you get orders by mail from your customers?

A. Yes.

Q. Outside of New York State?

A. Yes.

Q. And do you then notify the factory in Waterbury?

A. All of our goods are shipped out of Waterbury.

Q. On direction from you, is that correct?

A. That is right.

Q. And you send these directions by mail from 10 East 40th Street?

A. That is right.

Q. And do you also use the telephone to send out directions?

A. Well, in telephone conversations which is confirmed by mail.

Q. Do you have a teletype machine in your office?

A. No.

Q. What is the approximate gross value of your business in the course of the year?

A. Well, this is rather short notice, but I would say for the last two years it ran around \$72,000.

Q. Is that for each year?

A. Yes.

Q. How many people are employed by you at 10 East 40th Street?

A. One.

Q. In addition to yourself?

A. Yes.

MORRIS BERG, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Morris Berg.

Q. And what is your address?

A. 11 West 14th Street.

[fol. 239] By the Court:

Q. Are you located at 10 East 40th Street?

A. The firm whom I represent is located at 10 East 40th Street.

Q. What room?

A. 2103.

Mr. Proskauer: The area is 1430 square feet.

By the Court:

Q. What is your business?

A. General construction—National Structures Corporation.

By Mr. Herwitz:

Q. What position do you occupy with the company?

A. I am the auditor.

Q. Are you familiar with the general business of the company?

A. I am.

Q. How long has that company been located at 10 East 40th Street?

A. I don't know, but I came with the organization in 1936 and they were there at that time.

Q. Would you state the nature of the business of the National Structures Corporation?

A. They do general construction work.

Q. Of any particular type?

A. No particular type—various types, general heavy construction, consisting of bridges, highways, buildings, piers, cofferdams, subways, and so forth.

Q. Does that include factories?

A. We haven't done any.

Mr. Proskauer: You will take that business if you can get it.

The Witness: We will take it if we can get it.

By the Court:

Q. And do you bid on jobs where plans and specifications are prepared by other persons?

[fol. 240] A. Generally the plans and specifications are prepared by the awarding authorities.

Q. Do you also prepare plans and specifications for plants or prospective plants?

A. We do not.

By Mr. Herwitz:

Q. What work is done at the premises, 10 East 40th Street?

A. The 10 East 40th Street offices are general headquarters. All of the work conducted by the organization is done in the field at the job location.

Q. You mean the actual building?

A. The actual building.

Q. Are plans made for the building which is to take place at 10 East 40th Street?

The Court: He says that the work is already done on the plans and specifications prepared by the person who is seeking the bidders.

The Witness: Correct.

Q. Are plans examined at 10 East 40th Street with a view to ascertaining the bid which is to be put in by your company?

A. That is so.

Q. And is that one of the functions of the office at 10 East 40th Street?

A. Yes.

Q. Do you have an accounting department at 10 East 40th Street?

A. We have.

Q. And is all the accounting on these various jobs done there?

A. All of the general accounting is done there.

The Court: You can put that in a few words. Invitations to bid are received at 10 East 40th Street. They are examined there and proposals are prepared there and they are sent to the person who sends the invitation, and if the contract is awarded to them, they set up an office in the field for the purpose of super-
[fol. 241] vising the construction, and that office reports to 10 East 40th Street as to expenses and the office at 10 East 40th Street audits all of the amounts

that are involved in the contract. In other words, 10 East 40th Street is the administrative office.

The Witness: Yes. I see the Judge is very familiar with the construction business.

Q. Does your company do any of the purchasing of supplies and material out on the jobs?

A. We negotiate the purchase of supplies at 10 East 40th Street.

Q. Are those supplies so negotiated, sent to the job site?

A. Yes.

Q. Do you have any drafting tables of any kind at the office?

A. Yes.

Q. What are those drafting tables used for?

A. They are used to lay out the plans and specifications which the authorities—or I should say the awarding authorities—furnish us, so that the various trade representatives may come in and examine these plans in order for them to be able to submit a bid on their particular phase of the work.

Q. Could you give us an estimation of the volume of purchases made at the office 10 East 40th Street in the course of a year?

A. Well, each job is different in its nature and scope. Some require a great deal of purchasing of material; other are mostly labor with very little material and it would be impossible to give you a generalization, because each specific job is different.

Q. Would it run into millions of dollars or am I way off?

A. I think in a general way approximately 40 to 50 per cent of the jobs I would say consist of purchases of materials.

Q. What is the total volume of business done by the concern in the course of a year?

A. That also varies on their success and ability to secure jobs. Sometimes they have run \$2,000,000 and there have been times when they would be very much less.

[fol. 242] Q. What percentage of the work of the company is done with respect to jobs outside of New York State?

A. Up to the year 1940 and inclusive, we did exclusively work within the State of New York. However, in 1941, we

did work outside of the State of New York and that consisted of the following:

56.7 per cent in New York State; 4.3 per cent in New Jersey; 39 per cent in Maryland.

For 1942 the percentages ran 5.5 per cent in New York; 27 per cent in Maryland and 67½ per cent in the District of Columbia.

Mr. Proskauer: I suppose you had a Government job there?

The Witness: We had a job which was under the jurisdiction of the District of Columbia. However, it was intended to be for the Army Department.

Q. In your examination before trial, Mr. Berg, you were asked this question:

"Q. Do you have any draftsmen?

"A. This same engineer is a draftsman and designer.

"Q. Does he do any drafting work?

"A. Some—on occasions when that is required. He may re-design a piece of work which is then submitted to the field for procedure to follow. Very often stresses or beam-ing values are involved and it is required to find out how much weight a certain piece of work will carry. He will then design a structure which will fit the particular needs."

A. That still holds good. That engineer that we have is used as our estimator and very often the field is presented with a problem that is not presented on the original plan.

By the Court:

Q. Such as sub-surface difficulties, such as quicksand and things like that?

[fol. 243] A. Correct; and then the superintendent on the job asks the man to prepare some sort of a plan to follow in order to meet the particular emergency. This young man is somewhat of a draftsman and he studies the problem and prepares a tracing which would enable the field to be guided by those various plans prepared in that office.

By Mr. Proskauer:

Q. That is a rather rare occurrence?

A. That is only an unusual occurrence.

EDWARD ROBERT SOUTHOUSE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direction examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Edward R. Southouse.

Q. Where do you reside?

A. 712 Chatsworth Gardens, Larchmont.

Q. Mr. Southouse, what business are you in?

A. Export and import, pulp and paper.

Q. With what firm are you connected?

A. Parsons & Whittemore.

Q. Do they have an office at 10 East 40th Street?

A. Yes.

Q. What space do they occupy?

A. 701.

Q. What is the area?

Mr. Levin: 701 through 703 is 2800 square feet.

Q. How about 704?

A. 704 is probably the room we took in last year.

Mr. Levin: 704 is 1100.

[fol. 244] By the Court

Q. Do I understand you have it now and did not have it last year?

A. We have it now and did not have it prior to last year.

The Court: That makes 3900 square feet altogether.

By Mr. Herwitz:

Q. Is this the only office of your company?

A. Yes.

Q. What is the pulp and paper company's business?

A. We act as agents for mills.

Q. Are these mills for whom you act as agent located outside of New York State?

A. Canada now.

Q. Is there one mill or a great many of them?

A. The one that we are agent for is in Canada; we sell pulp for a mill in New Hampshire; another in Canada. That is since the war.

Q. Where are your customers located, in New York, or out of New York?

Mr. Proskauer: We concede that his sales are made in interstate commerce.

Q. Are these sales made from the office 10 East 40th Street?

A. Yes.

By the Court:

Q. Do you do your buying from 10 East 40th Street?

A. Yes.

Q. And you do your selling from 10 East 40th Street?

A. We have salesmen for the pulp industry in Dayton, Ohio, Massachusetts and Kalamazoo.

Q. And they report to 10 East 40th Street?

A. They are our agents, but the bulk of our business is export.

[fol. 245] By Mr. Herwitz:

Q. When you make these sales, do you prepare bills of lading for your customers?

A. No.

Q. You never do that?

A. That is done by the mills themselves.

Q. Do you use a teletype machine at 10 East 40th Street?

A. Would you call the Western Union and the Postal Telegraph Company teletype?

Q. You mean you have your regular service with those companies?

A. There are teletype machines there but no teletype machines in our office.

Q. Do you have any teletype machine in your office?

A. The Western Union and Postal have a teletype and we have machines that type the message to the head office.

Q. Do they telegraph to you and then do you relay it?

A. Yes.

The Court: They communicate between them and the telegraph company.

The Witness: Yes.

Q. Could you give us an estimate of the gross volume of business done by your concern in the course of a year?

A. It varies each year.

Q. All right, let us take the year 1941, do you have it by years?

A. \$3,245,761.

By the Court:

Q. What about 1940?

A. \$3,334,339.

Q. 1939?

A. \$2,216,252.

Q. 1938?

A. 1938 I haven't got. I was not asked for that.

Q. How about 1942?

A. I haven't got that. I was not asked about it, but up to date from January through June it is \$1,424,807.07.

[fol. 246] Mr. Proskauer: We will concede that it was substantial at all times.

By Mr. Herwitz:

Q. Do you prepare any advertising matter to send to your customers?

A. Samples only.

Q. And do you send those samples from the premises 10 East 40th Street?

The Court: It depends. If it is pulp they do, but they cannot send all samples.

The Witness: That is right.

JAC GEISMAR ALLERAND, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Jac Greismar Allerand.

Q. And your residence?

A. 533 Oakhurst Road, Mamaroneck.

Q. What business are you in?

A. I am acting as representative of Geismar & Co., a Louisiana Corporation of New Orleans.

Q. Do you have offices at 10 East 40th Street?

A. Yes.

Q. What space do you occupy?

A. 3301.

Mr. Levin: 565 square feet.

Q. How long have you been located there?

A. Since early January, 1942.

Q. Will you tell us what business your company is in?

A. The Louisiana Corporation are exporters of cotton [fol. 247] and cotton linters to Europe and the Far East. They have a subsidiary in Brazil, and we present both the Louisiana corporation and the Brazilian corporation in the sale of their products. For the moment, practically everything we sell is to the Government, so we sell through a representative of the Government agency. I don't know whether it is in Washington or in New York. Some agents are in New York and we also do direct business to Washington.

Q. From your office at 10 East 40th Street?

A. Yes.

Q. Does your office do anything besides selling?

A. Nothing but selling.

Q. How many people work in your firm here?

A. I am the only one in New York.

Q. How do you do your selling, by personal contact or by mail?

A. By mail, telegraph or telephone.

The Court: He is a selling agent, is he?

Q. You act as selling agent?

A. I am acting, in a sense, as representative of the Louisiana corporation.

By the Court:

Q. You don't do anything but sell, do you?

A. Yes, and I supervise investments. For instance, if the Brazilian company sell in Brazil to a Government agency goods which are later shipped to this country, I may have

to supervise anything pertaining to that particular business.

Mr. Proskauer: You include this fact that you do no manufacturing of any kind on these premises?

The Witness: None at all.

Mr. Proskauer: He is unquestionably engaged in a process of interstate commerce.

Mr. Herwitz: At 10 East 40th Street?

Mr. Proskauer: He is engaged in interstate commerce and the activities he conducts are the kind that [fol. 248] he has just described. He does no manufacturing of any kind.

The Witness: I am not doing any buying either.

By Mr. Herwitz:

Q. Does the firm you work for or for whom you are agent do any manufacturing?

A. No.

Q. Do they produce anything?

The Court: Yes, they produce cotton.

The Witness: No, they buy it.

Mr. Proskauer: He is an agent for an agent.

Q. Can you give us an approximation of the business done through your office 10 East 40th Street during the course of a year?

A. We have been there only very recently.

Q. You were there for a year.

The Court: 1942?

The Witness: Yes.

By the Court:

Q. During the year 1942 what was the total volume of sales made by your company?

A. Around perhaps \$25,000.

Q. Are sales also made by the office down in New Orleans? Do they make sales down there?

A. Yes.

By Mr. Herwitz:

Q. Do you have any teletype machines?

A. No.

Q. Do you maintain constant communication with the office in New Orleans?

A. With both offices, New Orleans and Brazil.

Q. By mail, cable and telegram?

A. Yes, mail, cable and telegram.

Q. And telephone on occasions?

A. Certainly.

[fol. 249] EUGENE KORTJOHN, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Mr. Kortjohn, do you work at 10 East 40th Street?

A. I do.

Q. With what firm are you connected?

A. Foley Bros., Inc.

Q. What space do you occupy?

A. The 13th floor with the exception that we have a sub-tenant, the Pleasantville Construction Company, Inc.

Q. Are they in the same business?

A. They are in very similar business.

Q. Suppose you tell us about the business of Foley Bros.

Mr. Levin: 9,544 square feet. That would include the sub-tenant.

Q. What is the business of Foley Bros?

A. We operate under a secret War Department contract for the War Department of the United States.

Q. How long have you been doing that work?

A. We have been doing that work since November, 1941, but we have been tenants since August 31, 1942, at 10 East 40th Street.

Q. You are in the general construction business, is that correct?

A. We are in general construction. However, it is specifically for this one project.

Q. If I should ask you a question that you consider not proper for me to ask or that you feel you are not permitted an answer, just tell me.

A. I will tell you.

Q. Can you tell us if you can whether the project being worked upon is outside of New York State?

A. It is outside of the United States.

Q. Can you tell us whether communication is maintained [fol. 250] between your project and your office at 10 East 40th Street?

A. It is, by mail and cable.

Q. And can you tell us whether that communication consists of information with respect to the construction work going on at that job?

A. It does.

Q. Or jobs, as the case may be. Can you tell me whether the personnel for the job or jobs is hired in any number at all through the office at 10 East 40th Street?

A. They are.

By the Court:

Q. You mean by that to some extent?

A. I was going to say we have hired some 1200 employees through the New York office.

Q. Are there other employees who were hired by some of the 1200 employees, that is what I am trying to get?

A. Do you mean whether I hire them myself?

Q. No, I mean whether other employees who are hired at the place of the job hire others?

A. Yes.

By Mr. Proskauer:

Q. They are hired by the United States Government, aren't they?

A. No; they are hired by the contractor.

By Mr. Herwitz:

Q. Do you dispatch these people from 10 East 40th Street to the job site?

A. We do.

Q. You arrange for their passage and do all incidental matters in relation thereto?

A. Yes.

Q. Is accounting work in connection with this project done at 10 East 40th Street?

A. It is.

Q. What accounting work?

A. The greatest bulk of it is the paying of the allotment in the United States to the banks for distribution to the men [fol. 251] remaining in the United States.

Q. Are payments also made to the banks in the United States and are the funds transferred from those banks to the point of the job site and wages paid there to the men working on the job?

A. I do not handle the payment of the payrolls abroad and the New York office does not.

Q. Are finances arranged by the New York office for these projects?

A. The greatest amount of financing is in connection with payroll and we do not buy the merchandise ourselves.

Mr. Proskauer: It is some construction job in a secret place, and he manages it in the way he has told us.

Q. Is there equipment dispatched from this country to the place where the job takes place?

A. May I volunteer some information?

The Court: Yes.

The Witness: Our office is advised of what equipment or material is required. We get up the specifications and request the War Department to purchase this for our account. We expedite the shipping of the material and it is shipped by the War Department through our supervision to the job. We never have title to the materials and equipment.

Q. I suppose it would be fair to say that the project involves the expenditure of several million dollars?

A. That is right.

Q. As to the business of the Pleasantville Construction Company, do you know anything about that generally?

A. I know, generally, yes.

Q. Can you in a general way briefly state what it is?

A. It is the same operation, the same exact character of operation with the exception that they have a Miami office which handles the greater bulk of the work.

[fol. 252] C. S. KENNEDY, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. C. S. Kennedy.

Q. And your address?

A. 15 Fairway Drive, White Plains, New York.

Q. Mr. Kennedy, do you occupy the space at 3302, No. 10 East 40th Street?

A. Yes, sir.

Q. Is that the Ames Bag Machine Company?

A. The Ames Bag Company.

Mr. Levin: That is 300 square feet.

Q. What kind of company is the Ames Bag Company?

A. They manufacture cotton bags.

Q. Where do they manufacture these bags?

A. Cleveland.

Q. What is done at the premises 10 East 40th Street?

A. I am eastern representative and my principal purpose there is to buy cotton goods where the commission cotton houses are involved. We use principally grey goods as they come from the factory.

Q. Do you purchase material in New York for shipment to your factory in Cleveland?

A. We purchase material through the commission houses who are the selling agents for southern cotton mills, and it is shipped from the southern cotton mills to our Cleveland plant where it is manufactured into bags.

Q. Do you have samples at 10 East 40th Street?

A. We do not need samples; we know what the product is.

Q. Will you estimate the annual value of production you have?

A. From the period referred to in the subpoena it amounted to about \$140,000.

Q. That is October 24, 1938, to June 1, 1942?

A. Yes.

[fol. 253] Q. Do you do any selling?

A. We do some selling. The sales for that same period for the Ames Bag Company amounted to about \$22,000 a year—an average of \$22,000 a year.

Q. As to these purchases that you have mentioned, are any of them from the premises at 10 East 40th Street?

A. The orders are placed from 10 East 40th Street.

Q. How do you place them, by telephone?

A. Mostly by telephone.

Q. Some by mail?

A. None by mail.

Q. How are these sales made?

A. Those are made principally by telephone to inquiries that come in to us.

Q. Do you make sales to customers both in New York and outside of New York State?

A. Yes.

Q. When sales are made, do you give instructions to your factory in Cleveland as to the sales and the method of delivery, and the place of delivery and so on?

A. That is right.

Q. Do you have a teletype machine?

A. Yes.

Q. And what use is made of that machine?

A. That is used for contact with southern mills about shipments.

Q. You mean the mills from whom you have purchased the material?

A. Yes.

Q. Is that more or less regular and continuous that you do that?

A. It used to be, but it is very infrequent now. The difficulties recently have been in getting cotton goods.

Q. And you speak of that difficulty as a result of the war?

A. Yes.

Q. Normally your contact is frequent, is that right?

A. Yes.

[fol. 254] LEWIS J. MILLER, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Will you state your name?

A. Lewis J. Miller.

Q. And your address?

A. 370 Fort Washington Avenue, New York City.

Q. You are located at 10 East 40th Street?

A. Yes.

Q. What business are you in?

The Court: Room number?

The Witness: 2607.

Mr. Levin: Shall we agree on 1100 square feet?

Mr. Herwitz: Yes.

By Mr. Herwitz:

Q. What business is your company in?

A. Well, we own several brands of cigars, which are made for us by factories.

Q. Do you know Stewart-Allen Company?

A. Yes.

Q. Do you sell their products?

A. Yes.

Q. Where are your customers?

A. All over the United States.

Q. What brands do you sell?

A. Well, we have Jose Garcia, Personality and Thomas Jefferson—we have several brands.

Q. Do you import these products?

A. No.

Q. Where do you get them?

A. They are made for us in factories at Tampa and Pennsylvania.

Mr. Proskauer: For the purposes of the case that is importation.

Q. Do you store some of this merchandise in the building at 10 East 40th Street?

A. No, we don't. There is nothing for sale there.

[fol. 255] Q. Do you store samples?

A. We have samples but not too much.

Q. Don't you have a room for that purpose?

A. We carry a small humidor, just to keep them fresh.

Q. Do you keep them in a separate room?

A. Yes; we have to do that.

Q. But you say you don't sell those?

A. We don't sell them.

Q. What method is used by you in making your sales?

A. Well, through contact and orders received through the mail.

Q. Personal contacts?

A. Personal contacts.

Q. Are personal contacts made by means of travel throughout New York State?

A. Yes.

Q. By salesmen?

A. One salesman.

Q. How does the business come to you?

A. On orders and as a result of inquiries.

Q. Do you send out any direct mail advertising to your customers?

A. No, sir.

Q. Do you have a steady list of customers out of New York State, is that it?

A. We do, yes.

Q. When you have orders, do you notify the manufacturers of the various brands to ship them to your customers?

A. That's it.

Q. In your communications to your manufacturers, do you give them instructions with regard to shipment?

A. Nothing except the best way.

Q. Is it shipped from the point of production?

A. It is shipped from the point of production directly to the retailer or jobber.

Q. Do you do anything else about selling or buying?

A. Of course, we have to buy the cigars at the best price and sell them under our brand. They are made primarily for us.

Q. And do you make your purchases from your office at 10 East 40th Street or go out of your office?

[fol. 256] A. On one occasion that I know of, yes, our Tampa man visited us in New York, but ordinarily it would be at the factory. It is very hard to say.

Q. Do you put in orders by telephone, mail, and so forth?

A. Yes; in the case of a rush order we will call the manufacturer and tell him, "Kindly ship."

Q. Do you do any radio advertising of any kind?

A. None whatsoever.

Q. Did I ask you whether you did any general advertising?

A. Just through trade journals.

Q. Where is the advertising copy written for those advertisements?

A. There isn't much to it, to be frank with you, because we have no advertising agency that does our advertising.

We have a representative of the trade journal come up here and we tell him what we want, and he submits proof to us and we o. k. it.

By the Court:

Q. He writes it?

A. Yes, he writes it for us.

By Mr. Herwitz:

Q. And that is submitted to you at 10 East 40th Street?

A. Yes. We make the corrections, if there are any.

Q. Can you give me an approximation of the annual business done by your firm?

A. In the neighborhood of \$110,000 a year since 1938.

Q. I have a note here about radio scripts written on the premises; is that an error?

A. Radio script written? You are probably referring to Fleming Hall Company.

Q. Tell us about that.

A. We operate different companies on the premises and Fleming Hall are manufacturers of cigarettes and tobacco.

[fol. 257] By the Court:

Q. Are the sales on behalf of Fleming Hall Company included in the \$110,000?

A. That question was not asked.

Q. What do the sales of Fleming Hall amount to approximately?

A. I would assume a million and a half dollars over the period since 1938.

Q. Do you ship any merchandise out of your premises or any of the products of any of the corporations to customers?

A. Occasionally a customer may have an overstock on hand, and if he is a local man he will return it to us and we will ship it to another jobber in the city.

Q. Is this shipping back and forth, as you just described carried on with customers frequently outside of New York State?

A. No, I cannot recall any particular instance where we did that. If anything like that occurs, we would request the customer to return it direct to the factory. If the mer-

chandise was in saleable condition, he would take it and ship it on other orders.

Q. When you receive this merchandise, do you sell it outside of New York State?

A. I don't remember occasions. I do remember we refused to return merchandise from people that we knew nothing about.

By the Court:

Q. You are referring to these rare instances?

A. It does not happen very often. I would say perhaps a half a dozen times a year. We haven't any available space for merchandise.

By Mr. Herwitz:

Q. Is your testimony with reference to the Stewart-Allen Company and its method of doing business with regard to sales to customers generally the same with regard to this company?

A. Yes.

[fol. 258] Q. The Fleming Hall Company?

A. It would of course; we have salesmen connected with Fleming Hall that do local missionary work and so forth.

By the Court:

Q. What do you mean by local missionary work?

A. In the cigarette and tobacco business we not only sell to jobbers—

Q. No, what do you mean when you say "local"?

A. I mean the metropolitan area. That is the only time we do missionary work is in the metropolitan area, being of course New Jersey and the surrounding territory.

By Mr. Herwitz:

Q. Metropolitan area includes New Jersey?

A. It includes New Jersey and Long Island.

Q. In other words, you promote the product which you sell to your officers.

A. Well yes, I would say yes.

Q. What is the proportion of sales made by the Fleming Hall Company in interstate commerce, that is to customers outside of New York State, to those made in New York?

A. About three-quarters of our total sales is outside of the State of New York.

JAC JARMAK, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name?

A. Jac Jarmak.

Q. And your address?

A. 145 Davis Avenue, White Plains.

[fol. 259] Q. Are you employed by a tenant at 10 East 40th Street?

A. Yes, by Cluett, Peabody & Company.

By the Court:

Q. Of Troy, New York?

A. No, I think the headquarters are in New York. I am employed in New York.

Q. What is the room number?

A. 17th floor entire and also 1801-6.

The Court: What is the square footage?

Mr. Proskauer: The 17th floor has 6415, and room 1801-6 has 3595 square feet, a total of 10,010, your Honor.

By Mr. Herwitz:

Q. What position do you hold?

A. Textile technician.

Q. In what business is Cluett, Peabody & Company engaged?

A. Manufacture of men's apparel, including neckwear, underwear, collars and handkerchiefs.

Q. Where does it engage in the manufacture of these products?

A. At various points, namely in Troy, New York, Corinth, New York, Leominster, Massachusetts, Atlanta, Georgia, and Waterford, New York.

Q. Does it manufacture all these products at these various plants?

A. No, sir; some products are manufactured at one of these plants, but all of them are engaged in some branch of the business.

Q. What activities are carried on by the company at the office at 10 East 40th Street?

A. Both advertising and merchandising. The merchandising constitutes the purchasing of material for the various lines.

Q. And where are these purchases made?

A. Well, they are mainly made through New York sales agents from plants which might be located in various parts of the country.

[fol. 260]- Mr. Proskauer: Would it help you if I concede they buy cotton goods and that the purchases that he refers to are purchases that are made by people who have their offices at 10 East 40th Street, on behalf of Cluett, Peabody & Company, from representatives of southern or New England cotton mills, which are located in New York City and shipped from the southern or New England cotton mills as the case may be, not through New York City, but directly to the Cluett, Peabody plants in Troy or whatever it happens to be bought for?

The Witness: That is right.

Q. Under the heading of merchandising is there any designing and selling carried on at 10 East 40th Street?

A. Yes, there is. We originate patterns; we do sketching of patterns in our office, and when we decide what patterns are to be made up into garments, we make layouts of those things and send them to mills.

Q. Have you brought any sample designs and layouts with you?

A. Yes, I have brought one of these. There is a layout we might make and a sketch and there is the cloth which results from that pattern.

Mr. Herwitz: I offer the layout in evidence as Plaintiffs' Exhibit 25.

Mr. Proskauer: No objection.

(Marked Plaintiffs' Exhibit 25.)

Mr. Proskauer: Don't encumber the record with offering pieces of cloth. Let me agree with you that what

he refers to are certain sketches of cloth which are made by the mills and conform to the design and specification shown on the last exhibit, No. 25.

That is right, isn't it?

The Witness: That is right.

[fol. 261] Q. Referring to Plaintiff's Exhibit 25, I ask you whether or not this, in the ordinary course of business, would be sent to the factory?

Mr. Proskauer: Didn't I just concede that?

The Court: I thought you did.

Q. How many persons are employed at the premises 10 East 40th Street by Cluett, Peabody & Company?

A. I would say roughly about 30. If you give me five minutes, I can put that all down.

The Court: That is close enough.

Q. Will you tell us in the category of these various employees how many salesmen are employed there?

A. The various salesmen employed there are not directly employed by Cluett, Peabody & Company. That is on a subsidiary account and I imagine there is just one salesman that makes his headquarters there; the others travel throughout the country.

Q. Do they report to that office?

A. Yes, by mail and they may report in person say twice a year or three times a year at the most.

By the Court:

Q. Where do they send their orders in?

A. The orders are sent to Franc-Strohmenger & Cowan, at 10 East 40th Street.

Q. What is that company?

A. That is a subsidiary company which makes neckwear alone, Resilio neckwear is the trade name.

By Mr. Herwitz:

Q. Where does this company maintain its factories?

A. At Troy.

[fol. 262] Q. Does it ship and sell to customers all over the country?

A. Yes, it does.

Q. How many salesmen operate out of 10 East 40th Street selling your product?

A. I think about eight.

Q. Do they maintain constant and continuous communication with the offices at 10 East 40th Street?

A. Yes, they do.

Q. And do they travel all over the country in connection with their work?

A. That is right.

Q. And maintain that communication from all parts of the country outside of New York State?

A. That is right.

Q. Those eight were not included in the 30, were they?

A. No, sir.

By the Court:

Q. Those 30 you said were not employees of Cluett, Peabody & Company?

A. They were included with Franc-Strohmenger & Cowan, because there are only about five or six people in Franc-Strohmenger & Cowan that make their headquarters at 10 East 40th Street all the time.

Q. These eight are not included in the 30?

A. No, sir.

By Mr. Herwitz:

Q. Do you have a showroom at the premises 10 East 40th Street?

A. For that subsidiary organization, yes.

Q. Do buyers come from all over the country to make purchases there?

A. Buyers come in, but most of their purchases are made from the salesmen on the road.

Q. You mean they come in just to see the line, is that right?

A. Occasionally, yes.

Q. Do you receive orders at 10 East 40th Street by telephone and telegraph?

A. Yes.

Q. Do you have any teletype machine there?

A. No.

Q. Is the president of the company at 10 East 40th Street?

A. Yes, he is.

[fol. 263] Q. What work does he do at 10 East 40th Street?

A. He just guides the destiny of the company.

Q. That includes production work of the company?

Mr. Proskauer: I object to that as incompetent and calling for a conclusion.

The Court: Sustained.

Q. Can you expand about guiding the destiny of the company that you have mentioned?

Mr. Proskauer: I don't like the form of that question and I think I must object to it.

The Court: Yes, the objection will be sustained. Ask him what he does.

Mr. Proskauer: If you know.

The Witness: I have an idea. He works with the vice-president in charge of each department. In actual physical work, he tries to keep his desk as clean as possible.

The Court: He would have to if you handle that kind of merchandise.

The Witness: Yes, indeed, but he will work with Mr. Kennedy, say, the vice-president in charge of production of all the plants; he may work with him by phone or Mr. Kennedy may come down once a week or once every two weeks.

The Court: Mr. Kennedy being located where?

The Witness: In Troy. He also works with Mr. Peffer in charge of merchandise at 10 East 40th Street; he also works with Mr. Buckingham, who is in charge of the market research and advertising. Aside from that, he may have some people who visit him, things of that sort. As far as other work is concerned, like setting up the policies of the company, that is of course pretty broad and you cannot define it exactly or just what he does in that respect.

[fol. 264] By Mr. Herwitz:

Q. Can you give us any approximation of the volume of sales made from the office at 10 East 40th Street, first of the subsidiary company, in the course of a year?

A. Approximately a million dollars a year.

Q. I suppose the business of Cluett, Peabody & Company would be many million dollars a year?

A. Yes. Last year it was approximately \$35,000,000.

Q. And these premises at 10 East 40th Street are the center or headquarters of that company?

A. The sales all come in through the sales offices of Cluett, Peabody & Company and the sales of the Cluett, Peabody & Company are not directly handled by 10 East 40th Street.

By Mr. Proskauer:

Q. They are handled at 2 Park Avenue?

A. Yes, sir.

By Mr. Herwitz:

Q. Is there anything done at 10 East 40th Street with respect to traffic control of merchandise ordered and to be shipped out to customers?

A. No; that is by our traffic manager who is located at Troy.

Q. Are copies of all orders sent in or do they come in at 10 East 40th Street?

A. The purchases or sales?

Q. The sales.

A. No, they don't come in at 10 East 40th Street. They go to the respective offices and then are sent to our sales record department in Troy, which handles the detail work of getting the order together and shipping it out.

Q. Are purchases made at the offices 10 East 40th Street?

A. Yes, they are.

Q. For all the factories?

Mr. Proskauer: He has already told us that, and I made a concession which covered it.

[fol. 265] Mr. Herwitz: I think you may be right and I withdraw that.

Q. Is there an advertising department?

A. Yes, there is.

Q. At 10 East 40th Street?

A. Yes.

Q. What advertising work is done there?

A. The advertising is in reality guiding the work of the agencies with reference to preparing ads for magazines.

preparing brochures and pamphlets for educational purposes, and preparing market research reports for our sales department.

Q. Would it be true to say that much of the display work and so forth is done right at the offices of 10 East 40th Street?

A. We have a display department which originates displays, as such, but those are handled by outside artists, of course, and outside printers too.

Q. Are the ideas for these displays frequently created at 10 East 40th Street?

A. Yes.

Q. And sent to outside artists?

A. Yes.

Q. And these outside artists after receiving the idea come with the finished idea to 10 East 40th Street?

A. Yes.

Q. And confer with the advertising manager there?

A. Yes.

Q. And corrections from time to time are made before the final product is agreed upon?

A. Right.

Q. Is the mechanical layout work done at 10 East 40th Street?

A. No; most of the mechanical layout work is done by the agencies which handle our advertising.

Q. The proofs and corrections of proofs are done at 10 East 40th Street, is that right?

A. Yes, they are.

Q. And all of these various displays and advertising matter we are here discussing are distributed at points and places all over the country, is that correct?

A. Yes.

Q. A gentleman who was examined before trial in this case was asked this question:

[fol. 266] "Q. Have you any idea of the volume of material of this nature, which would be sent out to your customers from your office at 10 East 40th Street, New York City?

A. It is very difficult to estimate; it varies year in and year out.

"Q. Would it be 30 or 50 thousand pieces per year?

A. Probably that."

Would that be a true statement as far as you know?

A. I don't know. He would be in a much better position to know that than I, because he was in the department.

Q. Do you have a mailing department at the office 10 East 40th Street?

A. We have a mail clerk in charge of mail that is sent out.

Q. Does he send out advertising matter?

A. Yes, he does. Some part of it is sent out from our office; some part of it may be sent out by the printer directly.

Q. Do you have any idea of the number of pieces sent out yearly by the mailing department at 10 East 40th Street?

A. No, I haven't.

Q. Is it many thousands?

A. I would guess so.

Q. Do you have a mimeograph machine in your office?

A. No, we haven't.

Q. Is there any other work done at 10 East 40th Street beside what you have told us? Let me put this to you; is publicity work done there?

A. Yes, publicity work is done.

Q. Are press releases gotten up at 10 East 40th Street?

A. Yes.

Q. And sent to various newspapers all over the country?

A. Yes, most of the releases for the press are handled through trade publications, but there are only a few. There are also press releases which are sent to newspapers throughout the country.

Q. Which are prepared in the first instance at 10 East 40th Street?

A. Yes.

Q. Are they mailed from 10 East 40th Street?

A. Yes.

Q. I think you said before that booklets and brochures are also created and sent from your office.

[fol. 267] Mr. Proskauer: No, he did not.

A. In some part.

Q. Will you tell us anything else with regard to publicity advertising which is carried on at the office at 10 East 40th Street?

A. Well, the advertising department as we have it at 10 East 40th Street consists of an advertising manager who is directly responsible for advertising. The display manager is responsible for display; the sales promotion manager and the publicity director, aside from the vice-president in charge of those department, are respectively responsible for those things, and that is the entire advertising department.

Q. Is the vice-president in charge of that department located at 10 East 40th Street?

A. Yes, he is.

Q. On the examination before trial your colleague was asked:

"Q. But the brochures and advertisements are prepared in the first instance in your office?

A. That's right, with the assistance of any outside artists we may need."

Is that correct?

A. Yes.

Q. He was further asked:

"Q. Is the editorial work done there?

A. Usually."

And he was asked if after the work is done the printers and photographers prepare the work in their final form and he said that was correct.

A. That is correct.

Q. You spoke of a market research department, did you not?

A. Yes.

Q. What is the function of that department?

A. That is to gather statistics of the sales in various sections of the country and to disseminate that information to the various sales offices.

Q. Is the work of the market research department confined solely to the sales department?

A. I would say its function is for the benefit of the sales department. Very often some records might be requested by some other department, but in the main it is for the sales department.

[fol. 268] Cross-examination:

By Mr. Proskauer:

Q. There is a vice-president in charge of production of this company, is there not?

A. Yes.

Q. His name is Kennedy?

A. Yes, sir.

Q. He is up in Troy?

A. Yes, sir.

Q. And he is responsible for the production of the company?

A. That is right.

Q. He has occasional conferences with the president?

A. That is true.

Q. Who is located at your office?

A. That is true.

Q. How many times a year does he come down to see the president, would you say?

A. I would say he comes down once every week or every two weeks.

Q. No merchandise is produced on these premises?

A. No, sir.

Q. When it comes to this advertising, first I will take up the subject of newspaper advertising. There are only five people that cover newspaper advertising and all other advertising, is that so?

A. That is right.

Q. As to newspaper advertising, you originate an idea and send it out to the agency, and the agency does the writing?

A. As to newspaper advertising, we do not do any newspaper advertising. The only thing we do in reference to that is college newspapers, and that is handled directly in our office.

Q. Magazine advertising is probably the phrase I should have used.

A. That is true.

Q. That is done by the agency, although you may originate ideas and suggestions and have conferences with the outside agency?

A. That is true.

Q. Displays are things that are put up in store windows or in stores, is that right?

A. Yes.

Q. That is what you mean by displays?

A. Yes, sir.

Q. Those are physically made outside of your place?

A. That is true.

[fol. 269] Q. Although one of these five men may have something to do with the idea of it or the preliminary design of it?

A. Yes.

Q. In some instances these displays are mailed from this office; in other instances they are mailed from the factory where they are originally produced?

A. I would say in the main, most of those displays are sent from outside our office. The only displays that may be sent from our office is occasionally when one or two have missed an order perhaps and they may be requested.

Q. So my question was wrong in that it intimated that a great many were sent from 10 East 40th Street?

A. On display work, yes.

Q. Now what are the other things, brochures?

A. Brochures and pamphlets.

Q. And those are sent in large part from 10 East 40th Street?

A. That is right.

Q. They are printed elsewhere?

A. That is right.

Q. Are they written at 10 East 40th Street?

A. The editorial work might be done at 10 East 40th Street.

Q. They are sent both from 10 East 40th Street and from the printing shop?

A. Yes.

Q. How would you say that was divided, about half and half?

A. Roughly half and half.

FRED C. HAASE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. State your name?

A. Fred C. Haase.

Q. And your residence?

A. 8804 Third Avenue, North Bergen, New Jersey.

Q. Are you connected with the Allied Liquor Industry?

A. I am.

[fol. 270] Q. Do they have an office at 10 East 40th Street?

A. They do.

Q. What space do you occupy?

A. 1904.

Q. They have 1500 square feet?

Mr. Proskauer: I will take that subject to correction.

The Witness: Approximately 1000 square feet.

Q. What is the business of the organization?

A. It is a public relations organization in connection with the liquor industry.

Q. How many people are employed by that organization at 10 East 40th Street?

A. 11.

Q. And what do these 11 people do?

A. We have an executive president, vice-president, director of public information, director of regulation, secretary, assistant director of public information and secretary, and one stenographer. That makes 12.

Q. Is this the only office of the organization?

A. That is the only office.

Q. Do they do publicity work on a national scale in that office?

A. We do national public relations work.

Q. Thank you; I am sorry. Will you describe briefly the nature of the public relations work that you do there?

A. Well, we have a sort of research department which gathers information as to legislation that is taking place both in the national Congressional departments and various legislative halls throughout the states and with the dissemination of this information to the trade as well as for public consumption. We have a program of military cooperation, which it would take a lot of time to explain, but briefly it is sort of educational program directed to the tavern keepers and so forth, and to the requirements of our armed forces; then such things as OPA regulations and things of that type that we keep our membership pretty well advised.

[fol. 271] By Mr. Proskauer:

Q. You are a membership organization?

A. We are.

By Mr. Herwitz:

Q. What type of members do you have, distillers or what?

A. Our membership consists of distillers, as well as members from various organizations such as the tavern associations in the various localities.

Q. Do you have individual memberships?

A. We have no individual memberships.

Q. I assume these memberships come from all over the country?

A. That is correct.

Q. Do you keep in more or less contact with your members by means of issuing information to them from your office at 10 East 40th Street?

A. We do.

Q. And do you prepare releases for newspapers?

A. We do.

Q. They are prepared at 10 East 40th Street?

A. Prepared at 10 East 40th Street.

Q. Are these releases from time to time printed verbatim in newspapers following their issuance at 10 East 40th Street?

A. No.

Q. Is the substance of them printed?

A. Very often.

Q. Do you send these releases to newspapers in any particular locality or all over?

A. It depends upon the release.

Q. Do you have releases on a national scale?

A. Sometimes.

Q. Are there releases sent from your office at 10 East 40th Street?

A. It varies according to the release.

Q. Are some of them sent directly from the premises 10 East 40th Street?

A. Yes.

Q. Do you have a mimeograph machine there?

A. No, we have not.

[fol. 272] Q. Where are these releases printed?

A. They are prepared outside.

Q. From copy made at the office 10 East 40th Street?

A. From copy made at the office.

Q. Do you have any publications?

A. Yes.

Q. Where is the editorial work on the publication done?

A. 10 East 40th Street.

Q. How large a circulation does that publication have?

A. Approximately 450.

Q. Is it a monthly publication?

A. Weekly.

Q. And is any diagrammatic work done in connection with this publication?

Mr. Proskauer: I object to that as irrelevant.

The Court: I will allow it.

A. I don't get the question.

Q. Are any diagrams made for inclusion in the magazine at 10 East 40th Street?

A. Yes.

Q. Does this magazine go only to members, is that correct?

A. No, members and prospective members and to such people as various officials of liquor administrators and so forth, all down the line throughout the country.

Mr. Herwitz: That is all.

By Mr. Proskauer:

Q. The magazine I suppose is shipped out from the printer's office?

A. It is mailed by the printer; it is not mailed by ourselves.

Mr. Herwitz: Mr. Sherwood.

[fol. 273] ROBERT F. SHERWOOD (54 Crescent Road, Port Washington), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Do you work at 10 East 40th Street?

A. Yes, sir.

Q. For what firm?

A. United Feldspar Minerals Corporation.

Q. And does that firm occupy the space 2007 in that building?

A. Yes.

Q. That is 980 square feet?

A. Yes.

Q. Now, will you tell us, Mr. Sherwood, what business is carried on at the premises 10 East 40th Street?

A. Practically none.

Q. What business is United Feldspar Minerals Corporation in?

A. We are in the minerals business.

Q. Do you manufacture, mine or distribute or sell minerals? Will you tell me?

A. Mine and sell.

Q. And is that a subsidiary of any other corporation?

A. No, Sir.

Q. Where is the mine or mines? Where are they?

A. In North Carolina and Maine.

Q. And how long have you had an office at 10 East 40th Street?

A. I don't know.

By the Court:

Q. How long have you been connected with the company?

A. Seven years.

Q. Have they had an office there during all that time?

A. Yes, sir.

By Mr. Herwitz:

Q. Did they ever do anything at 10 East 40th Street?

A. Not that I know of.

[fol. 274] Q. Well, will you explain that? Will you explain why they keep an office there?

A. Well, because the president of the company lives there and I live there. We live in New York; we live in and around New York. All of our records are kept in our plants. You asked me to bring records. I haven't got them. I could not get them. It would take me weeks to get them.

Q. Well, do you work at 10 East 40th Street?

A. I work at 10 East 40th Street, yes, sir.

Q. What do you do there?

A. My job is executive vice-president.

Q. That is a title. What work do you do?

A. Well, just what the title implies. I run the corporation.

Q. You run it from that office?

A. No. I run it when I go down to the plants entirely. I write letters there, yes.

Q. I mean, you write letters from 10 East 40th Street to the plants?

A. That is right.

By the Court:

Q. How often do you go to the plants?

A. About an average of once a month. We have three plants.

Q. And how long do you spend at the plants when you go there?

A. Anywhere from a day to a month.

By Mr. Herwitz:

Q. And in the interim you spend your time in New York?

A. Not entirely, no.

Q. What do you do?

A. I do a lot of sales engineering work.

Q. And in that work do you work out of the New York office?

A. No, I work out of the plants. That is, I live—the only reason I am here is because I live here, in New York.

Q. Well, what work do you do at 10 East 40th Street?

[fol. 275] A. Well, I will get a letter from the plant asking me anything, and I will write and answer it.

Q. Can you describe the nature of this correspondence that takes place between yourself and the plants?

A. Well, it has to do with everything connected with the operation of the plants.

Q. Does that include production going on at the plants?

A. Yes, sir.

Q. Are you a production man?

A. No.

Q. Well, in what respect will it have to do with production? Will you tell us that?

A. Well, we have two orders, we will say—the plant has two orders—

By the Court:

Q. Now, would either one of those orders, suppositiously, come through 10 East 40th Street?

A. No, we get no orders at all. We get copies. All the others are sent direct to the plants.

Q. Copies are furnished to you?

A. Yes, for our records, and they might ask me which one of them to send first, and I might write and tell them which one of them to do first, because I know all of our customers.

By Mr. Herwitz:

Q. Are the products of these mines shipped from the places where they are mined to customers in various States of the Union?

Mr. Proskauer: We will concede that the products are shipped in interstate commerce.

The Court: Is there any doubt about that?

Mr. Proskauer: No, not the slightest, your Honor. We will concede the products of the mines are sold and shipped from the mines in interstate commerce.

[fol. 276] Q. Do you sell for these mines? Do you do any selling?

A. Who, I myself, personally?

Q. Yes.

A. Yes.

Q. What is the method that you use in selling? Personal contact?

A. Yes.

Q. Telephone?

A. Some, but very little. The only time—my job is a trouble-shooting job.

Mr. Proskauer: Is a what?

The Court: Trouble-shooter.

A. (Continued). If somebody has trouble with my feldspar I go out and tell them where they are wrong and the feldspar is right.

Q. Well, do you correspond with the various customers of the company?

A. Once in a while. There again the only time I have a chance to correspond with them is usually when they are

in trouble or they ask advice as to either how to use our product or how to use a certain clay with our product.

Q. Well, do you regularly correspond with customers out of the State of New York from the premises 10 East 40th Street?

A. Yes.

Q. And do you customarily correspond with the mines that are operated by your company out of 10 East 40th Street?

A. That is right.

Q. Are the means of correspondence by mail, telephone, telegraph, etc.?

A. Yes.

Q. Is that right?

A. Yes.

Cross-examination.

By Mr. Proskauer:

Q. Just a question or two: The actual production, of course, is done at the mines?

A. Yes, sir.

Q. You are not an engineer or anything of that sort?

A. Yes; I am a ceramic engineer.

[fol. 277] Q. A what?

A. A ceramic engineer.

Q. A ceramic engineer?

A. Yes.

Q. But you do not have anything to do with the production at the mine?

A. No.

Q. That is done by mining engineers?

A. Yes.

Q. When you say you are a ceramic engineer, you mean you have been trained in the processes in which feldspar is used?

A. That is right.

Q. Not in the production of feldspar?

A. That is right.

Q. And you do not give instructions as to how the mining is to be done, or how the stuff is to be produced?

A. No, sir.

Mr. Proskauer: That is all.

Re-direct examination.

By Mr. Herwitz:

Q. Is that the only business carried on from those premises?

A. Well, we are not only in the feldspar business; we are in other minerals too.

By the Court:

Q. Well, do you carry on the business with relation to other minerals in the same manner?

A. Exactly the same.

By Mr. Herwitz:

Q. Are you the selling agent for anybody?

A. No, sir.

Q. Do you do any selling for anybody else?

A. No, sir. We have an associated company, the Carolina Phyrophyllite Company, which is another mineral the same as feldspar. We have olivene, mica, beryl, flint, quartz. The business is all carried on the same as feldspar.

[fol. 278] Re-cross examination.

By Mr. Proskauer:

Q. The answers you gave me about the production of feldspar apply to the production of the other minerals too?

A. Yes.

The Court: Next witness.

JOSEPH M. SIMON (108-03 67th Road, Forest Hills, Long Island), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Mr. Simon, what company are you connected with?

A. Birmingham & Prosser Co., Inc.

Q. Do they occupy space 3207 at 10 East 40th Street?

A. That is right.

Mr. Herwitz: 650 square feet, is that correct, Mr. Levin?

Mr. Levin: Yes, sir.

Q. What business is Birmingham & Prosser engaged in?

A. Selling paper. Sales of paper.

Q. Do they have any factory?

A. No.

Q. Are they agents for other companies?

A. That is right.

Q. And do they sell the products of various factories?

A. Yes, a good many.

Q. And where are these factories located?

A. All over the United States.

Mr. Proskauer: I will concede that his concern are the selling agents for paper manufacturers who produce and sell paper in interstate commerce.

[fol. 279] Q. Do you make these sales from the premises at 10 East 40th Street?

A. In some cases.

Q. Will you tell us the different methods used by you in making your sales?

A. We call on our customers in New York and throughout the State.

Q. Yes?

The Court: I think you can shorten this a whole lot.

Mr. Herwitz: Yes?

The Court: You can first inquire what the volume of business is, what part of that business is New York State business, what part of it is business outside of New York State.

Mr. Herwitz: Yes.

Q. Would you tell me the average annual volume of business done by your firm?

A. I cannot tell you that because we have no records that are complete in New York. Our headquarters are in Kalamazoo, Michigan, and we have no records that I could get to show you—

By the Court:

Q. Well, can you state any percentage? Can you state in percentage what part of your business is New York State business and what part of it comes from out of the State?

Mr. Proskauer: Does your Honor mean what part of the business that they handle at 10 East 40th Street?

The Court: Yes.

A. What we do here in New York?

Q. Yes, here in New York.

A. I would say about 30 per cent of it is New York State business. The balance of it is out of the State.

[fol. 280]- By Mr. Herwitz:

Q. Now, we are trying to get some idea of the amount of business done at 10 East 40th Street without trying to be exact. Can you say whether it is measured in the hundreds of thousands, or millions, or what?

A. I would say it would be under a million for a year.

Q. Under a million?

A. Yes.

Q. Would it be in the neighborhood of a half million?

A. Oh, approximately that. I have no idea. I mean, I can't tell you that.

Mr. Proskauer: I am willing to concede that the sales are approximately a half million dollars a year.

Mr. Herwitz: All right.

Q. Now, for the out-of-town customers, that is, the out-of-State customers, what method is used of salesmanship?

A. Well, we call on the out-of-State customers the same as we would on State customers.

By the Court:

Q. Do you have salesmen going around?

A. No, we do not.

Q. Who calls on these customers?

A. I do. It is a one-man organization. I am a representative of the Michigan corporation. We merely have a sales office and a sample room.

Q. Now, do you call on somebody outside of the State of New York and make a sale and obtain an order?

A. Yes.

Q. Now, when you call on somebody outside of the State of New York and make a sale and obtain an order, do you send that order in to the Kalamazoo factory, or wherever [fol. 281] the factory is which is to make and stock the orders to be filed, or do you bring the order back to New York and send it out from 10 East 40th Street?

A. No; I would send it right from the town that happens to be in to the branch, and all we keep is the record of a sale there. We do not have any other billing—

Q. The bookkeeping?

A. Everything is done, outside of the sales—it is merely a place to hang your hat in New York. That is what it amounts to.

By Mr. Herwitz:

Q. Do you communicate with your customers by telephone from the premises at 10 East 40th Street?

A. Yes.

Q. And do you frequently make and induce sales with your customers by means of telephone from your premises at 10 East 40th Street?

A. By telephone, yes. We do not use the office for anything else. We very seldom have any customers, or never have any customers call on us.

Q. But you use the telephone from that office to call customers?

A. Yes, that is right.

Q. And does that include calling customers out-of-State?

A. Yes.

Q. And do you, in connection with orders received, or about to be received, frequently use the telephone to call your main office in Kalamazoo, Michigan?

A. That is right.

Q. What would be the nature of those telephone conversations? State the purpose for which you make those calls.

A. Well, it would be chiefly on delivery. If we are slow on delivery, why, we would call up. That would be the only time that we would ever call.

Q. Would that mean that customers of yours would get in touch with you to hurry deliveries? Is that what you are getting at?

A. Yes.

Q. And you would call your main office in Kalamazoo [fol. 282] to relay the customer's message or complaint with that regard?

A. That is right.

Q. And do you from that office at 10 East 40th Street carry on regularly and continuously a correspondence by mail with your main office in Michigan?

A. Yes.

Q. Concerning the work done at 10 East 40th Street?

A. The sales work, yes.

Q. The sales work?

A. Yes.

Q. Including the sales work with respect to sales made to customers out of New York or out of Michigan; is that correct?

A. That is right.

Mr. Proskauer: I do not believe I am going to make any more concessions to you. You do not take them.

Q. Will you tell me whether or not the paper which is ordered is in existence at the time of its being ordered by a customer, or is made or prepared for the order?

A. Well, in some cases it would be and in some cases not. In some cases it is stock paper that is already prepared—

By the Court:

Q. I suppose you have stock goods indicated by either a number or a letter?

A. That is right.

Q. And then, if a person does not wish to buy the stock paper—

A. We have it made up.

Q. You make up whatever the customer wants?

A. That is right.

By Mr. Herwitz:

Q. There is no purchasing done at 10 East 40th Street?

A. Not a bit..

Q. Is there any other business carried on by the New York office?

A. No, sir.

[fol. 283] HARRY T. IMMERMANN (554 Forest Avenue, New Rochelle, New York), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Do you work for Spencer, White & Prentiss?

A. Yes, I do.

Q. At their offices at 10 East 40th Street?

A. Right.

Q. What space do they occupy in the building?

A. It is on the 14th floor. Room 1406.

Mr. Herwitz: I have 3100 square feet. Is that correct, Mr. Levin?

The Witness: Yes.

Mr. Levin: Right. 3100 square feet. That is correct.

Q. Will you state what business Spencer, White & Prentiss is in?

A. Spencer, White & Prentiss are engineers and contractors specializing in foundations, underpinning and heavy construction.

Q. And they have jobs all over the world, do they not?

By the Court:

Q. Let me just ask a question about that so we keep our record straight here: Does Spencer, White & Prentiss occupy any part of the office on the 13th floor of Foley Bros.?

A. Yes, sir. That is another corporation. That is known as Foley Bros. and Spencer, White & Prentiss.

Q. I see. And this space that you are talking about now on the 14th floor—

A. Is entirely Spencer, White & Prentiss.

Q. Foley Bros. have nothing to do with that?

A. No, sir.

The Court: All right. Proceed.

[fol. 284] By Mr. Herwitz: 

Q. I think I asked you whether or not Spencer, White & Prentis have jobs all over the world.

A. I should say that would be taking in a little too much territory.

Q. Well, you have jobs out of the country, have you not?

A. Not at present.

Q. You have had?

A. We have had.

Q. And it is not too unusual for you to have such jobs?

A. No, it is not too unusual.

Q. Well, you have them all over the country at any rate; no question about that?

A. No, no question about that.

Q. Will you give me generally the volume of business done by Spencer, White & Prentis in the course of a year?

A. I do not know the exact figure, but it is—if you mean in work which we do in conjunction with other contractors—

Q. Yes.

A. —I would say it was several million dollars.

Q. Several million dollars?

A. Yes.

Q. Now, what work is done at 10 East 40th Street?

A. Just the administrative work.

Q. Now, will you describe that, please?

A. The work—well, you want general replies? You do not want what I myself do? I mean, my work is confined to what was our original business, and that is the installation of foundations and underpinning. Where we combined with other contractors, separate corporations are formed, and I have nothing to do with that.

Q. Yes?

A. We interview architects, builders, engineers, prospective customers; try to obtain jobs. If we are successful, we assign men to the work, and the men go out and do the job.

Q. Do you hire men for these various jobs at 10 East 40th Street?

A. For local jobs, yes.

[fol. 285] The Court: When you say local jobs, do you mean—

The Witness: Jobs here in New York, Greater New York.

Q. Do you hire key men for these various out-of-State jobs?

A. The key men we keep in the organization year after year.

Q. I see. And they are dispatched from 10 East 40th Street to the job, wherever it may be?

A. That is right.

Q. And do these men report back to you on the progress of jobs that they are on?

A. They do.

Q. Is any financing done through the main office at 10 East 40th Street?

A. All the financing is done. In an out-of-town job we send money to some bank there, and the local superintendent could draw on that if he needed it for payrolls.

Q. Do I understand, then, that arrangements are made at 10 East 40th Street for the transfer of funds to points outside of New York for that purpose?

A. That is right.

Q. Now, do you have any drafting tables at 10 East 40th Street?

A. Yes, we have some drafting tables.

Q. Well, to what purpose or to what use are those tables put?

A. Just sketch plans for the guidance of our men in the field.

Q. Who makes up those plans? Who sketches those plans?

A. Well, some of our engineers.

Q. And are they then mailed to the site of the job?

A. They are usually given to the job superintendent to take with him at the start of the job.

Q. And if in the course of a job or the middle of a job any problems come up, are plans sometimes made up at 10 East 40th Street in connection with problems that arise?

A. Yes.

Q. And then mailed out to the job site?

A. They are either mailed out, or if the superintendent happens to come in over the weekend, we give it to him.

[fol. 286] Q. And is there a regular and continuous telephone communication between the job site out of the State of New York and 10 East 40th Street?

A. Well, there are occasional calls. I would not call it a regular communication service. As a rule, the superintendent might call up once a week, or something like that.

Q. You mean periodic reports?

The Court: Is it your contention that so far as the nature of the business and the way it is done by Spencer, White & Prentis, is any different than the Foley and Spencer, White & Prentis concern?

Mr. Herwitz: I would say no, your Honor.

Mr. Proskauer: We concede it.

The Court: Why can't you stipulate that the same conditions exist in the one case as in the other?

Mr. Herwitz: I will accept that.

The Court: Do you agree to that, Judge Proskauer?

Mr. Proskauer: Yes, your Honor, if that will end it. I do not want to concede it and then go over the same ground.

The Court: All right, then we are not going to go over the same ground.

Mr. Herwitz: Judge, we will end it.

Mr. Proskauer: If that will end it I will concede it.

Mr. Herwitz: Thank you.

[fol. 287] FRANCES SUTTON (393 Broadway, Bayonne, New Jersey), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Do you work for Bernard Reis?

A. I work for the American Investors Union.

Q. And is that organization located at 10 East 40th Street?

A. That is right.

Q. What suite do they occupy?

A. 3307.

Mr. Herwitz: 3307.

The Court: Square feet?

Mr. Herwitz: 1430. Is that right, Mr. Levin?

Mr. Levin: 3307?

Mr. Herwitz: Yes.

Mr. Levin: I have 430—no, that is right. 3307-8, 1430 square feet.

The Court: Does he also occupy Room 3308?

The Witness: No, that is occupied by Mr. Reis's personal business.

Mr. Proskauer: Mr. Reis runs this union?

The Witness: He is the executive director.

The Court: I understand that. I was trying to get the area involved, and if he personally occupies Room 3308.

Mr. Proskauer: Does your Honor want a separate area for that?

The Court: No. You have got it here.

Mr. Proskauer: Room 3308 is a much bigger room, isn't it?

Mr. Levin: It is 1000 square feet.

The Court: The statement was that the space is 1430 square feet; and then when it was discovered that there was a Room 3308, it became 1430 square [fol. 288] feet; so I naturally assumed it was a thousand square feet.

Mr. Proskauer: That is correct.

Q. Are these offices connected one with the other?

A. No.

Q. They are separate?

By the Court:

Q. They are adjoining, aren't they?

A. Yes.

Q. A partition in between?

A. Yes.

Q. Without a door?

A. Yes.

By Mr. Herwitz:

Q. Will you tell us what this union is that you work for, what its business is and what activities are carried on at 10 East 40th Street?

A. We publish a monthly magazine called "Your Investment," giving information and advice to stockholders and investors. We also prepare information on legislation pending in the Congress that is likely to affect the persons who own stocks and shares and bonds, and so forth. It is a non-profit-making subscription service. The rate is \$5 a year. It is a monthly publication.

Q. And how much of a circulation does it have?

A. Our circulation is approximately 3600.

Q. And what percentage of the subscribers are outside of New York State?

A. 3100.

By the Court:

Q. 500 in New York?

A. 500 within New York State.

By Mr. Herwitz:

Q. Is this a monthly publication? Is it prepared on the premises at 10 East 40th Street?

A. Yes.

[fol. 289] Mr. Proskauer: Wait a minute. What do you mean by "prepared?" It certainly is not printed there.

Mr. Herwitz: I will get to that.

The Witness: Everything but the printing is done on the premises.

By the Court:

Q. The editing is done on the premises?

A. That is right.

Q. Then it goes to the printer in the rough copy?

A. That is right.

Q. And after the printer gets through with it does it come back to you?

A. Yes.

Q. And then it is mailed out from that office?

A. That is right.

By Mr. Herwitz:

Q. In addition to the magazine, are any other advices or informations regularly sent to subscribers?

A. Well, you might classify correspondence under that heading. We correspond with our subscribers and answer specific questions on investments and trusts, and so forth.

Mr. Herwitz: I offer this as Plaintiffs' Exhibit 26 for Identification.

(Marked Plaintiffs' Exhibit 26 for Identification.)

Q. Where is Mr. Reis?

A. He is not available.

Mr. Proskauer: I will concede that Bernard Reis is a certified public accountant practicing his profession in the other office.

Off the record.

(Discussion off the record.)

[fol. 290] By the Court:

Q. Do you work for him?

A. You mean in his own office?

Q. Yes.

A. No; I work for "Your Investments" of which he is executive director.

Mr. Herwitz: Can you enlarge the stipulation at all, Judge Proskauer?

The Court: In what respect?

Mr. Herwitz: As far as out-of-State clients are concerned.

Mr. Proskauer: Oh, yes. I will concede he has out-of-State clients for whom he does the ordinary work of a certified public accountant.

Cross-examination.

By Mr. Proskauer:

Q. You say this is a non-profit organization?

A. That is right.

Q. You have members?

A. Yes.

Q. Do they join and pay so much a year?

The Court: \$5 for the magazine. That gives them the right, I suppose, to ask questions which have to be answered singly and directly?

The Witness: That is right.

Q. And nobody makes any money out of it?

A. That is right.

Mr. Proskauer: That is all.

Re-direct examination.

By Mr. Herwitz:

Q. Well, do you make any money on the job?

A. How do you think I maintain myself? I get a salary.

[fol. 291] Q. Does Mr. Reis get a salary?

A. No; he does not get a salary.

Q. Are you the only one that gets a salary out of this magazine?

A. I get a salary, plus the person who does the writing for the magazine.

MARY PATCHIN (10 West 15th Street, New York City, N. Y.), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Mr. Martin Klein (Assistant United States Attorney): If it please your Honor, this witness about to testify is an employee of the United States Employment Service, and naturally counsel is liable to ask questions which are specifically prohibited in the regulations; and my purpose in coming here was to either sit in at the time the questions were asked, for the purpose of objecting, or securing from counsel a statement that the questions will be general in nature.

The Court: I do not think you need worry about that at the present time. You just remain here.

Mr. Proskauer: Why can't we cover this all by—

The Court: Just a moment. Let us find out first what it is all about.

By the Court:

Q. By whom are you employed?

A. I am employed by the United States Employment Service.

Q. What is the suite number?

A. Well, we have three floors at 10 East 40th Street.

Q. What are they? What floors?

A. 10th, 11th and 12th floors.

[fol. 292] The Court: What is the square feet area?

Mr. Levin: 32,000 square feet.

The Court: 32,000 square feet.

Q. And are you in charge of that office?

A. I am superintendent.

Q. And do you carry on there a business for or on behalf of the Government?

A. We carry the employment agency.

Mr. Proskauer: On behalf of the Government?

The Witness: Yes.

Q. That is, do you employ people to work for the Government?

A. No, not necessarily. For any employer.

Q. Is the purpose of this agency to furnish employment to persons?

A. That is right. To serve employers.

The Court: All right. I think you can probably arrive at some stipulation on that.

Mr. Proskauer: This space was originally rented to the New York State Employment Bureau, which is the tenant on the lease. It was by them, as I understand it, though I am not sure of that, with the consent of the building, turned over to the United States Employment Service—

The Court: When?

Mr. Proskauer: In October 1941. That is an agency of the Federal Government.

The Witness: That is when we entered the building.

Mr. Proskauer: I beg your pardon?

The Witness: We entered the building in October 1941.

Mr. Proskauer: That is what I am saying, Madam. And you are a Federal Government agency—

[fol. 293] The Court: Let me ask this question, if the witness knows.

By the Court:

Q. Did the business of the New York State Employment Bureau cease, or was it taken over by the United States Employment Service?

A. It was taken over by the United States Employment Service.

Q. And then you enlarged upon that?

A. No, we still have about the same size staff, practically.

Q. Well, do you carry on approximately the same type of business as was formerly carried on?

A. Yes.

Mr. Proskauer: By "business," I assume your Honor means activities?

The Court: Employment activities.

Now, do you gentlemen wish to make any further stipulation?

Mr. Proskauer: My information is that they place generally about 50,000 people in the course of a year. Is that correct?

The Witness: That is correct.

Mr. Proskauer: And about 98 or 99 per cent of those people are placed in employment within the State of New York.

The Witness: I would say that was true.

The Court: 98 per cent in New York. All right.

Mr. Proskauer: My memorandum also says that practically all the applicants for employment are residents of the State of New York.

Would that be true?

The Witness: Yes. Generally true. There are a few from New Jersey, but if they work in New York they can come to our service.

[fol. 294] Mr. Proskauer: Now, is there anything else you want?

Mr. Herwitz: Well, it would, of course, be noted that the United States Employment Service and this office at 10 East 40th Street is one of many such employment services, branches of which exist in various States of the Union throughout the country.

Mr. Proskauer: It may be a fact, but I do not see the relevancy of it.

The Court: You may confer, Mr. Klein, if you want to, with the witness. I want to find out if this agency

is connected in any way with any other agency anywhere in the United States.

Mr. Kaplan: Judge, this agency is a separate agency of the War Manpower Commission, and the War Manpower Commission is a Federal agency with—

The Court: What I am trying to get at is, assuming there is a United States Employment Service in Chicago and another one in Philadelphia and another one in Boston,—is this agency in New York conducted independently of those agencies?

Mr. Kaplan: They are all conducted as State offices of a federal agency. The United States Employment Service operates—

The Court: No, you do not get my point. I understand what Commission McNutt's organization does from a national standpoint.

Mr. Kaplan: That is right.

The Court: This is a branch of his agency. I am not asking what the relation is of the United States Employment Service at 10 East 40th Street to the War Manpower Commission in Washington. What I am asking is whether there is any relation between the operation of the United States Employment Service at 10 East 40th Street and any other service of a like [fol. 295] character any other place in the United States.

Mr. Kaplan: In a sense they are all subordinate to the United States Employment Service office in Washington.

The Court: Of course. I am a member of the United States District Court which covers the whole United States, and I am presiding here in the City of New York. Now, what relation have I to a court which is sitting today out in Salem, Oregon?

Mr. Kaplan: None, except where there might be a referral of a matter, and that is where there is a relationship. There are referrals between offices.

The Court: Well, all right. Out of 50,000 people who are placed in employment in the course of a year, how many referrals are there?

Mr. Kaplan: Well, Miss Patchin might answer that.

The Witness: I would say the referrals might run three to four times the number of persons.

Mr. Kaplan: No, the referrals from out-of-State. From out-of-State to out-of-State. Clearances between New York State and other States.

The Witness: Oh. Very small percentage. Maybe one or two per cent.

The Court: All right.

Mr. Proskauer: Your organization is designated the New York State branch of the U. S. Employment Service?

The Witness: That is right. We are the commercial office.

Direct examination.

By Mr. Herwitz:

Q. Do you supply a particular type of employee?

A. That is right.

Q. What type?

A. White collar only.

[fol. 296] Q. And do you supply such employees, among others, to factories producing goods, merchandise?

A. To offices or factories.

Q. Yes?

A. Office help.

The Court: 98 per cent of which she said is in the State of New York.

Mr. Herwitz: But will it be conceded that a substantial portion of the jobs filled are filled in New York State to plants producing goods in New York State, which goods are shipped in interstate commerce?

Mr. Proskauer: No.

Mr. Herwitz: Then I will have to inquire whether that may be so.

The Witness: Well, we supply workers to offices of industrial plants as well as to all these downtown offices all over the City.

By the Court:

Q. You furnish the opportunity for a white collar employee to get a job wherever there is one?

A. That is right.

Q. Whether it is an industrial plant, or as an attendant in the doctor's office?

A. Yes.

By Mr. Herwitz:

Q. Do you know whether or not you have supplied help to any firms engaged in production of goods?

A. Oh, yes, we have.

Q. Will you state, Madam, the names of any of the firms that you know of that the United States Employment Service at 10 East 40th Street has supplied employees to, which firms are engaged in manufacture and production in New York?

A. Can you think of one, two or several of those firms?

A. Yes.

[fol. 297] Q. Would you name them?

A. Firms in the dress industry business?

The Court: In New York City.

The Witness: That is right. Do you want me to name the firms?

Q. Yes, please.

A. I can think of several. Antman & Bart; Carmel Bros.—

Mr. Proskauer: If it will shorten it any, I will concede that they supplied white collar workers to firms or corporations in New York City; which firms, in turn, some of them, do interstate commerce, or even manufacture goods for interstate commerce.

Q. Well, now, will you state the type of employees that you supply?

A. For these particular firms we supplied models.

Q. I am not confining it to those particular firms.

A. Office workers of various kinds; bookkeepers; cashiers—

The Court: Stenographers, clerks, filing clerks—

Q. Designers?

A. Designers.

Q. Draftsmen?

A. Draftsmen.

Q. Engineers?

A. Engineers; all white collar occupations.

Q. Pattern makers?

A. Pardon me?

Q. Pattern makers?

A. I am not sure that we—I presume so.

The Court: Well, what kind of pattern makers? I know pattern makers that do not wear white collars. If you are talking about a pattern maker in a stove works, that is a different thing.

[fol. 298] Mr. Herwitz: Pattern makers in the dress industry.

A. (Continued) Well, if they are designers we supply them. I do not remember having placed any pattern makers.

The Court: If you are talking about dress pattern makers, that is another matter.

Mr. Proskauer: Your Honor, in making that concession I want it distinctly understood that I regard it as wholly irrelevant. I think it is quite absurd to contend that the elevator men can be claimed to have engaged either in commerce or production of the goods for commerce, because they took the lady upstairs—

Mr. Goldwater: No, because they take all the employees who come there upstairs.

Mr. Proskauer: Or even the employees who come there upstairs.

Mr. Herwitz: Let us get the record straight and argue the law later, if we may.

By Mr. Herwitz:

Q. Are all of the employees who apply for a job interviewed at 10 East 40th Street?

A. That is right.

Q. By one of the members of the staff?

A. That is right.

Q. And their qualifications for the various jobs are made a record of, is that right?

A. That is true.

Q. And then they are sent out as requests come in; is that correct?

A. Yes; they are sent out on jobs if we have jobs at the time for which they qualify.

Q. Now, do you maintain any communication or regular communications with Washington, any office in Washington?

A. Not through our office. We don't do that. That goes [fol. 299] through our administrative office, communications to Washington.

By the Court:

Q. Where is the administrative office?

A. The administrative office is at 11 West 42nd Street.

By Mr. Herwitz:

Q. Do you send copies of your records to this office that you have just mentioned, the main office in New York?

A. That is right.

Q. And do you know whether records sent by you to that office ultimately find their way to Washington?

A. Well, through our Bureau of Research and Statistics.

Mr. Proskauer: I object to that as irrelevant.

The Court: I am going to allow it. I think it is irrelevant myself, but I am going to put it in the record so it will be there if anybody has to pass on this question after I get through with it.

GUNNAR T. HANSSON (St. Nicholas Road, Darien, Connecticut), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Have you worked at 10 East 40th Street?

A. Yes.

Q. Suite 2201?

A. No. 2202.

Mr. Herwitz: Is that 750 square feet?

Mr. Levin: That is correct.

[fol. 300] Q. In what business are you?

A. My firm is in the import and export business of paper mill supplies, wood pulp and newspaper.

Mr. Proskauer: I can't hear a word he says.

The Court: In the import and export business of paper mill supplies, wood pulp and newspaper.

By the Court:

Q. What is the name of your firm?

A. Elof Hansson, Inc.

Q. What is the total volume of business that you do?

A. In New York?

Q. Yes.

A. It is very small right now. - It is about half a million a year.

Q. Well, what was it before the United States went into the war? What was it in 1942?

A. This company, Elof Hansson, Inc., did not exist—it has only been in existence two years.

Q. Well, how much business have you done during the two years of your existence.

A. Well, about a million dollars worth.

Q. And did you occupy this office before Elof Hansson, Inc., was organized?

A. No.

Q. Do you carry any stock on the premises?

A. No.

Q. In other words, the material which you handle is either imported or it is manufactured in this country?

A. Yes.

Q. And exported?

A. Yes.

Q. Do you sell any manufactured products for domestic consumption?

A. Yes, some of it.

Q. And all of this merchandise that is manufactured in this country is manufactured outside of the State of New York, is it?

A. No.

Q. What percentage of it is made in New York State?

A. I could not say. Very little.

[fol. 301] **Q.** Very little made in New York?

A. In New York State, yes.

Q. And is it shipped—

Mr. Proskauer: I won't make any question, your Honor, that he negotiates the sales that go into interstate commerce.

The Court: Well, I had not got to that point. I wanted to lay a foundation here for a concession. Of course, the merchandise that he exports and the merchandise that he imports, that is foreign commerce. Whatever is made in the State of New York and sold in the State of New York is intrastate commerce.

The Witness: I have nothing of that.

The Court: And whatever may be made in one State and sold in another State, that is interstate commerce. I am just trying to find out what the nature of the business is, that is all.

Q. Where are these pulp mills?

A. The pulp mills are some in Canada, some in Florida, some out in Washington, Oregon, Newfoundland and Sweden.

The Court: All right, go ahead.

By Mr. Herwitz:

Q. Now, do you negotiate these sales at 10 East 40th Street?

A. Yes.

Q. And do you correspond with your customers from 10 East 40th Street?

A. Yes.

Q. In all parts of the world, is that right?

A. Yes.

Q. And all parts of the United States?

A. Yes.

The Court: Well, let us exclude the parts of the world that we are not having any commercial relations with just now.

[fol. 302] Mr. Herwitz: All right, Judge.

The Witness: Mostly South America.

Q. And do you make out shipping documents for your customers?

A. No.

Q. Do you have a teleprinter on the premises?

A. Yes, sir.

Q. And do you communicate with the mills that you sell for, or have dealings with, by means of that teleprinter?

A. Yes.

Q. And with your customers also?

A. Yes.

Q. And both instances, outside of New York State?

A. Yes.

HARRY H. BOND (137-81 Belknap Street, Springfield, Long Island), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. What business are you in?

A. We are consulting engineers.

Q. What suite do you occupy at 10 East 40th Street?

A. 3401, 3405.

Q. How much space do you have—

The Court: Is that 3401 to 3405, or two separate rooms?

The Witness: Two separate rooms.

The Court: 3401 and 3405?

Mr. Levin: The combined space there would be the total of 770 and 650.. 1420 feet, isn't it?

The Court: Which is 770? 3401?

Mr. Levin: 3401. And 3405 is 650.

Q. Now, as I understand it, you specialize in air-condition plants, is that right?

[fol. 303] The Court: Just a minute.

By the Court:

Q. What is the name of the firm?

A. Edward R. Ashley, consulting engineers.

Q. What connection do you have with this company?

A. Partner.

Q. Do you hold any office in the corporation?

A. It is a partnership.

Q. Partnership?

A. Yes.

Q. It is not incorporated?

A. No.

The Court: Go ahead.

By Mr. Herwitz:

Q. You specialize in what?

A. We design mechanical equipment for buildings, and air-conditioning is one of the items.

Q. Do you do business with customers or clients outside of New York State?

A. Some.

Q. Can you give us the portion of your business for clients in New York State and for clients outside of New York State?

A. It varies each year. One year we might have 25 per cent in New York and the next year 25 per cent outside of New York State.

Q. I see. What is the total volume of business done by your concern in the course of a year?

A. That would be, with the consulting engineering business, would run about \$75,000 a year.

Q. The cost of the jobs would be a great deal more?

A. Definitely. That equals, on a fee basis, it is about 5 per cent.

Q. Do you do drafting and designing at the premises 10 East 40th Street?

A. Yes.

[fol. 304] Q. And do you have drafting tables there?

A. Yes, sir.

Q. How many do you have?

A. Eight.

Q. And when plans are made, designs are made at 10 East 40th Street, what are done with them? What use is made of the work done at 10 East 40th Street?

A. Plans are prepared and specifications are prepared and sent to our clients where the clients might be architects or owners.

By the Court:

Q. Is the preparation of these plans or specifications preceded by some inquiry?

A. Definitely.

Q. You have to know beforehand what the proposed thing is that you intend to provide or improve?

A. Yes. We are called in by architects who may be commissioned to do a building, and we act as their consulting engineers on mechanical equipment.

Q. You first find out what the plans for the construction of the building are?

A. Yes, sir. They are turned over to us.

Q. And then you design the mechanical equipment which is to go into that building?

A. That is correct.

Q. And then when you have completed the drawings and specifications, you turn those over to the person who employed you?

A. If they request it. Otherwise we have the plans made and send the plans to them.

Q. That is what I mean. Now, what do you have to do with the letting of the contracts for the work?

A. We do not have anything to do when we are employed by architects. But when we are employed directly by owners we sometimes assist the owners.

Q. By that you mean you supervise the letting of the contracts?

A. We sit in with them.

Q. And supervise the fulfillment of the contracts?

A. Yes, sir.

[fol. 305] By Mr. Herwitz:

Q. Do you purchase any materials?

A. No, sir.

Q. Do you supervise that at all? Do you have anything to do with the purchase of materials?

A. We approve materials that are submitted to us by the contractors.

Q. Do you have a representative at the job while it is being done?

A. If our contract calls for it we do. Sometimes weekly inspections and sometimes daily inspections, depending upon location.

Q. And when a job is out of the State, then you send a man from time to time to look it over to direct or to supervise the job?

A. Inspect it only.

Q. Inspect it only?

A. Yes.

Q. And do your representatives report to you as to the progress of jobs?

A. That is right.

Q. Do you keep in touch with the job by telephone or by any other means of communication?

A. Occasionally. It is mostly calling in to us.

Q. At your premises at 10 East 40th Street?

A. Yes, sir.

Q. Are these plans drawn at 10 East 40th Street sent by mail to the owners, to where the owners are located?

A. If it is any great distance, certainly.

Q. And if the owners are outside of New York State, then you will send the plans made at 10 East 40th Street to the owner outside of New York State?

A. Correct.

Mr. Proskauer: Or the architects.

Q. Or the architects, as the case may be?

A. Yes.

Q. How many draftsmen are employed? Did I ask you that yet?

A. Not yet.

Q. How many?

A. Just draftsmen?

[fol. 306] By the Court:

Q. How many employees in the whole office?

A. About 13.

Q. And of those 13 how many are draftsmen?

A. About seven.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. The drafting tables are in which office, Mr. Bond?

A. 3405.

Q. All the drafting is done in that room?

A. Yes.

EUGENE E. ORMSTEN (130-06 228th Street, Springfield Gardens, Long Island), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. M. Goldwater:

Q. Mr. Ormsten, are you an officer of the Prudence Bonds Corporation?

A. Yes, sir.

Q. Will you tell us what space they occupy at 10 East 40th Street?

A. They occupy approximately one-half of the 9th floor.

Q. The total area of the 9th floor is—

Mr. Proskauer: He will give you the area in a minute.

Mr. M. Goldwater: I have it at 12,220 feet, the total area.

Mr. Proskauer: The whole floor?

Mr. M. Goldwater: The whole floor, yes.

Mr. Proskauer: And he occupies half that?

Mr. M. Goldwater: One-half that.

[fol. 307] The Witness: Approximately.

Mr. Proskauer: That is substantially correct.

Q. That is the only space in the building that the company or the corporation occupies?

A. Yes, sir.

Q. How long has the corporation been in that building?

A. I think since June, 1941.

Q. Now, it is a fact, is it not, that this corporation is an outgrowth of the reorganization of the old Prudence Company, or Prudence Bonds Company?

A. Yes.

The Court: I will take judicial notice of that.

Q. And this corporation has taken over the management—I am speaking quite generally now—of some 18 issues of Prudence Bonds.

A. That is right.

Q. Can you tell us approximately the total number of bondholders in those 18 issues?

A. There are approximately 20,000 bondholders.

Q. And can you say approximately how many of those have their office addresses on your records outside of the State of New York? Just as generally as you can. Nobody is going to hold you to an accurate count.

A. I handle the list pretty much all the time. I am afraid I can't answer that question.

Mr. Proskauer: Would it be 5 per cent or 10 per cent or 20 per cent? Give us a rough idea.

Q. Another officer of your company, for your information, says approximately 20 per cent. Do you agree or disagree—

A. Outside of New York State?

Q. Yes.

A. That might be a good guess.

Mr. Proskauer: I will take that.

Q. Would it be the approximate amount, as a reasonable guess for both of us here?

A. I don't know, and I handle the list all the time.

[fol. 308] Mr. Proskauer: I will take it at that figure.

Mr. M. Goldwater: The president of the company says 20 per cent.

Mr. Proskauer: Despite that I will take it at your figure.

Mr. Levin: Mr. Goldwater, my record here indicates 5000 square feet for Prudence Bonds.

Mr. M. Goldwater: He says approximately half of the floor.

Mr. Levin: Half would be 6,110.

Mr. M. Goldwater: He says approximately. I guess that is as close as we can get it.

Mr. Levin: Is 5,000 satisfactory?

The Court: 5,000 is the figure.

Mr. Levin: The figure I gave is the one I have.

The Court: That represents exactly what he calls approximately half.

Mr. Levin: I imagine so.

Mr. M. Goldwater: That figure will do. It is not important.

Q. Now, Mr. Ormsten, is there any regular correspondence with the bondholders of the Prudence Bonds Corporation?

A. Yes.

Q. And how frequent is the regular correspondence?

A. Well, we communicate with them twice a year by forwarding interest checks to them; and, of course, we send them financial statements and reports.

Q. And do those financial statements and reports go out twice a year? Do I understand you to mean that?

A. Twice a year.

Q. Accompanying the interest checks?

A. That is right.

Q. Now, are there in various of these issues properties outside of the State of New York?

A. Yes, sir.

Q. And are those properties managed by agents outside of the State of New York?

A. Yes, sir.

[fol. 309] Q. Can you give us approximately the number of properties?

A. Five pieces of property.

Q. Five altogether outside of the State of New York?

A. That is right.

Q. Are some of those in Chicago?

A. That is right.

Q. Any in Boston?

A. No.

Q. What other States beside Illinois?

A. New Jersey and Connecticut.

Q. I call your attention to the fact that the 11th Series contains Chicago properties. Is that the fact?

A. Well, the 11th contains some and so does the 12th.

Q. The 11th contains some?

A. And so does the 12th, and so does the 7th.

Q. There are only five pieces altogether outside the State of New York?

A. Yes, that is right. Five pieces.

Q. How can three of these contain some and there be only five altogether?

A. There are three pieces of property in the State of Illinois; there is one in the State of Connecticut and one in the State of New Jersey. They are a different series.

Q. All right.

By the Court:

Q. How many of the Chicago properties are in one series?

A. There is one—

Q. 7th, 11th and 12th?

A. One in the 7th, one in the 11th and one in the 12th.

By Mr. M. Goldwater:

Q. Aside from these regular reports that are sent out with your interest checks twice a year, have you had any occasion during the last few years to have irregular statements sent—

Mr. Proskauer: I hope not—

[fol. 310] The Court: Wait a minute.

Mr. M. Goldwater: I am sorry, I meant statements at irregular times.

The Court: You said the last few years. You must confine yourself to the period June, 1941 as far as this property is concerned. He says they have been there since 1941.

Mr. M. Goldwater: I am sorry, your Honor. That is right.

A. When bondholders write in and make inquiries concerning their particular holdings, or questions of interest, or questions of information, why, we communicate, we answer them.

Q. But haven't you had any interim reports, or reports of other character in the last two years since you have been there?

A. There has been correspondence concerning the expiration of a voting trust agreement, or retirement of bonds, or principal payment on bonds.

Q. Well, you say correspondence. Do you mean that there has been a notice sent to every bondholder in any issue that was involved?

A. That is right; but they write in with reference to the particular—

Q. You mean you might have specific inquiries as well?

A. Yes.

Q. But you have had a general letter sent to all the holders of the bonds with respect to the redemption—

A. Oh, no, with reference to the retirement of bonds.

Q. Retirement; and you have also had correspondence with respect to the expiration of a voting trust, to all the bondholders?

A. That is right.

Mr. Proskauer: Is that all?

Mr. M. Goldwater: I think that is all—oh, I think I omitted to follow up the question with respect to the agents out of town.

[fol. 311] Q. You do get regular reports from these agents with respect to the management of the properties?

A. That is right.

Q. And how frequently do you get those?

A. Monthly.

Q. Monthly?

A. Yes.

Q. And you acknowledged them or correspond concerning items on those reports quite regularly?

A. Yes, sir.

Mr. M. Goldwater: That is all.

Cross examination.

By Mr. Proskauer:

Q. You said you managed these Prudence Bonds issues, and I want to know just what you mean by that. Does this company of yours own the real properties?

A. Prudence Bonds has—

Q. If you will answer my question we will get on much more quickly.

A. All right, sir.

Q. Do you own the real estate?

A. No, sir.

Q. What is it that your company that your represent owns?

A. Let us say—

Q. You don't own that bonds?

The Court: Well, in the reorganization of the Prudence Company what was transferred to your company by the Court or at the direction of the Court?

The Witness: I will change my answer. We own the property and the title to the property is being held in trust by the City Bank Farmers Trust Company.

Q. You mean you own the real estate itself?

A. That is right.

The Court: They own the equity.

[fol. 312] Q. You have the equity in the real estate, but instead of having the title directly in you it is in a trustee for the benefit of the mortgage bondholders?

A. That is exactly right—

Q. And when you speak of bondholders, you mean mortgage bondholders who hold bonds secured by mortgage lien in all of these various properties?

A. And also the actual properties.

Q. And in some cases where you foreclosed the mortgage you own for the benefit of the bondholders through the trust company the real estate itself?

A. That is exactly right.

By the Court:

Q. Who collects the rents?

A. Prudence Bonds Corporation.

Q. And are the rents turned over to the City Bank Farmers Trust Company?

A. No. Eventually the income from the properties which are received from rents is turned over to the bondholders in the form of interest after the expenses have been paid on the property.

By Mr. Proskauer:

The Court: Well, does the City Bank Farmers Trust Company handle it?

The Witness: No, sir.

Mr. M. Goldwater: They get a report, Judge.

The Witness: They do not handle it.

The Court: We do not do it that way here.

Q. Do the people who collect the rents, the real estate agents who collect the rents, turn them over to you?

A. For out-of-town properties?

The Court: Any property.

[fol. 313] Q. Any properties.

The Court: All properties.

A. Yes.

Q. And then your company has these rents?

A. That is right.

Q. And you pay the taxes?

A. Yes, sir.

Q. And the other charges on the property?

A. Yes, sir.

Q. And whatever is left you turn over to the bondholders in the form of interest as far as it will go?

A. Yes, sir.

Q. Now, that is what you are doing?

A. Yes, sir.

Q. You do not buy anything, any merchandise; you do not sell any merchandise; you manage these properties for the bondholders?

A. That is right.

Q. Through agents. You do not do it directly even?

A. That is right.

Q. And how many properties are there that are in this scheme, approximately?

A. All of our properties?

Q. All of them in all the series.

The Court: I do not think you ought to call this a scheme.

Mr. Proskauer: Well, I meant—

The Court: A project.

Mr. Proskauer: A plan, a project. I did not mean anything offensive.

A. Approximately 150 properties.

Q. Out of these 150 properties 5 of them are outside the State of New York?

A. Yes, sir.

[fol. 314] H. LAWRENCE HERBERT (1 Parkside Drive, Great Neck, Long Island), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Are you connected with the Standard Magazines, Inc. located at 10 East 40th Street?

A. I am.

Q. What space does your firm occupy there?

A. About 6000 square feet.

Mr. Proskauer: 5600 to be exact. The 14th floor.

Mr. Herwitz: I have 5700.

The Witness: I imagine it is 5825.

Mr. Proskauer: We will compromise on 5700.

Q. Is that the whole 14th floor?

A. No; that is two-thirds of it.

Q. Two-thirds of it?

A. Yes.

Q. Now, will you tell us what business Standard Magazines, Inc. are in?

A. They are publishers of general fiction magazines, general and fiction magazines.

Q. I show you a printed slip of paper and ask you whether those are the magazines published by Standard Magazines, Inc.?

A. They are.

Mr. Herwitz: I ask that that be marked for identification.

(Marked Plaintiffs' Exhibit 27 for Identification.)

Mr. Proskauer: We can have them copied right into the record if it is agreeable to his Honor.

The Court: Isn't it quite long?

The Witness: That is quite long. There are some 60 of them.

The Court: All right. Just mark it.

[fol. 315] Q. How many people work at the premises at 10 East 40th Street?

A. On the premises, between 35 and 40.

Q. Do you have various departments on the premises?

A. We have an editorial department—

Mr. Proskauer: Speak a little louder, will you please?

The Witness: It is a little difficult. We have an editorial department, a general business office and a sales office.

Q. Is this the main office of the company?

A. Yes.

Q. Now will you tell us what the editorial department does?

A. The editorial department interviews authors and artists. They purchase stories from free-lance writers and artists. Once the material is furnished, it is edited and then sent to a printer. The printer returns a galley proof from which the magazines are prepared; corrections are made on that, and I imagine that covers it.

Q. Are these magazines, a list of which is contained in Plaintiffs' Exhibit 27 for Identification, distributed throughout the country?

A. Yes.

Q. Where are these various magazines printed?

A. In New York, Chicago, Illinois, New Jersey and Connecticut.

Q. What determines the place where they are to be printed?

A. Oh, we have our work divided among several printers. The work done in Jersey is of a certain type; the work done in Chicago is also done in New York; half of it is done in Chicago and half in New York. Half of the work that is done in Connecticut is also done in New York. That is, Brooklyn.

Q. Now, let us say that you sent a manuscript to the plant in Chicago for printing. Once the manuscript is printed, what happens to it?

Mr. Proskauer: He just told us. The proof comes back and he corrects it.

[fol. 316] Mr. Herwitz: No. After it is printed. He has not been into that, Judge.

A. After the manuscript is printed?

Q. After the book is printed, how is it then distributed?

A. Oh, it is distributed through a general distributor, the American News Company.

Q. Do you know what the American News Company does with it? How do they distribute it?

A. They have a system of branches, sub-branches, galley dealers, and so on, and they ship it for us to these various branches.

Q. I see. In other words, what is printed at the Chicago plant would be sent to the American News Company, and they are distributed—

A. To the American News Company subsidiary in Chicago.

Q. To the American News Company subsidiary in Chicago, and then they are distributed to places outside of the State of Illinois?

A. That is right.

Q. And in all parts of the country, I suppose. In the West, is that right?

A. That is correct.

Q. And the same general practice would be followed with respect to manuscripts printed, books or manuscripts printed at these various other printing plants used by your company?

A. That is right.

Q. Can you give us an estimate of the circulation of these various magazines put out by Standard Magazines?

A. You do not want the individual magazines, do you?

Q. No, gross.

A. All the magazines?

Q. Yes.

A. For 1942 we—sold or distributed?

Q. Give me both if you can.

A. We sold about 25 million magazines. We probably distributed between 32 and 35 million.

Q. I see.

Q. Where is the paper purchased that goes into these magazines?

A. Generally from our office in 10 East 40th Street.

[fol. 317] Mr. Proskauer: I can't hear a word you say, Mr. Witness.

The Witness: Generally from our office at 10 East 40th Street.

Q. And how are those purchases made, by mail or telephone?

A. By telephone and by mail. Usually by telephone, and followed up by an order.

Q. And where are these mills from whom you purchase the paper? Are they outside of New York State?

A. We generally purchase through brokers or mill representatives.

A. They usually have local offices.

Q. Do you know as a fact that the paper comes from mills outside of New York State?

A. I do, yes.

Q. And shipped from these mills to your printing plant?

A. That is right.

Q. Now, in addition to the story there is also art work in connection with these magazines, is that correct?

A. That is right.

Q. Is that edited also on the premises at 10 East 40th Street?

A. Yes.

Q. Will you describe that procedure?

A. Well, once we purchase the story, we have an art director who would contact an artist. The artist would come to our premises, be given this story to read, and he would pick out a spot to illustrate. And that is all done on a freelance basis. The artist is not an employee.

Q. And after he makes up his picture, does he bring it back to the office at 10 East 40th Street for correction?

A. That is right.

Q. Can you estimate the total volume of sales of your magazines that are made at points outside of New York State?

Mr. Proskauer: I will concede it is a very substantial proportion.

Mr. Herwitz: I will accept that concession.

[fol. 318] Q. Now, is there anything else done at 10 East 40th Street, any function performed, that you have not testified to?

Mr. Herwitz:

Cross-examination.

By Mr. Proskauer:

Q. This space you occupy, about how much of it is devoted to the editorial and art departments and how much to the regular business departments?

A. About 40 per cent to the editorial and art department.

Q. And the business department occupies the remaining 60 per cent?

A. Business and executive.

Q. Business and executive?

A. Yes.

Q. Is there a regular buyer of paper?

A. I usually do that myself.

Q. There are not any other men concerned with that process excepting you?

A. No. It is usually done just once a year.

Q. And what you do to buy paper is, you talk on the telephone with a paper agent or broker and make a deal for supplying your year's supply?

A. Yes, sir.

Q. And you do that about once a year?

A. We do that once a year, and each month we follow up with supplementary orders based on this contract.

Q. You do that all yourself?

A. I do that myself.

Q. And no other employees are concerned with that?

A. No, with the exception that they do any typewriting—

Q. Yes, purely incidental and negligible stuff, I imagine.

A. Yes.

Q. Now, when we come down to the production of the magazine itself, there is nothing printed on the premises?

A. Nothing at all.

Q. The stories are not written on the premises?

A. No, they are not.

[fol. 319] Q. They are read there and accepted or rejected, I suppose, by a reader?

A. Yes.

Q. And you may do some editorial revision work on the story, I assume?

A. That is right.

Q. Your art work is all done outside by free-lancers?

A. Substantially so.

Q. And what your art department does is to edit it or make slight changes, or something of that sort?

A. Yes.

STANLEY LOWEN (37 Huntington Drive, Yonkers, New York), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. What business are you in, Mr. Lowen?

A. Sales agent.

Q. Are you in business at 10 East 40th Street?

A. That is right.

Q. What space do you occupy?

A. I would say it is slightly under 250 square feet.

The Court: What is the number of your office?

The Witness: 3406.

Mr. Proskauer: Ask him to speak up, won't you?

Q. Will you speak up, Mr. Lowen, so I can hear you over here?

A. Yes.

Q. Now, who are you the sales agent for?

A. Wheeling Stamping Company.

Q. And where is their factory located?

A. Wheeling, West Virginia.

Q. And you sell all the products of that company?

A. No.

[fol. 320] Q. Do you sell products of some other company?

A. No, sir.

The Court: He means he is not the only person who sells for that company.

Mr. Herwitz: I understand.

Mr. Levin: Did you get the space on that?

Mr. Herwitz: 250 square feet. I have 240; he said 250.

The Witness: I said slightly under 250.

Mr. Levin: 240 is correct.

The Court: All right.

Q. Now, within what area do you make these sales?

A. Within eight Eastern States.

Q. What is the method used in making the sales?

A. Personal contacts, mail, telephone.

Q. And when the mail is used and the telephone is used, do those telephone conversations or correspondence emanate from the office at 10 East 40th Street?

A. That is right.

Q. Directed to your customers in the eight Eastern States?

A. That is right.

The Court: What is the volume of business that you do?

The Witness: Approximately 150,000 a year.

Q. Of which how much is sold to customers outside of New York?

A. I could not say.

Q. At any rate, all of the merchandise is shipped from your plant in Wheeling to customers outside of that State, is that correct?

A. Every shipment emanates from Wheeling.

The Court: Are these shipments made direct to the customer or do they come to you first?

[fol. 321] The Witness: Direct to the customer.

Q. Are they made pursuant to order, or are they on hand?

A. Pursuant to order.

Q. And you send the order according to the directions sent to you, is that correct?

A. Yes.

Q. Do you have a teletype machine?

A. No, sir.

Q. Do you maintain regular or continuous correspondence with your factory?

A. I do.

Mr. Herwitz: That is all.

Cross-examination.

By Mr. Proskauer:

Q. What kind of material is it that you sell?

A. Collapsible tubes and plastic bottle caps.

Q. Aren't those stock things?

The Court: He said so.

A. No. Each tube is manufactured to specifications. Bottle caps are stock caps.

Q. So that the stock caps are not made to order, are they?

A. Well generally they are.

Mr. Proskauer: I see. All right.

The Court: I thought you said these goods are sold from stock.

The Witness: No.

The Court: All right.

[fol. 322] W. E. LUNDBERG (4 Darmouth Street, Forest Hills, Long Island), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Are you in business at 10 East 40th Street?

A. Yes, sir.

Q. And what space do you occupy?

A. 4310.

Q. Is that connected with the Textile Economic Bureau, Inc.?

A. Yes.

Mr. Herwitz: 4310. How much is that?

Mr. Levin: 965 square feet.

Q. What is the Textile Economic Bureau?

A. We publish the magazine "Rayon Organon," which is a trade publication for the textile industry, and specifically deals with problems in the rayon industry.

By the Court:

Q. Do you carry on any other business there than the circularization of this magazine?

A. Well, you see, we are a market and statistical research group, and we are on a contract basis, a fee basis.

Q. You do not buy or sell any merchandise?

A. No, not at all.

By Mr. Herwitz:

Q. And how large a circulation does this magazine have?

A. 5000 a month.

Q. And how much is outside of New York State?

A. Well, it is very difficult to answer. It goes to many retailers, wholesalers, rayon producers, weaving mills. I should say a good 60 per cent.

[Vol. 323] Q. I see. And this magazine written at 10 East 40th Street?

A. That is right. It is written in my home.

Q. Written in your home?

A. Yes, that is right.

Q. Exclusively?

A. No. I write at home. I am so busy, I haven't got time to do it in the office. So I write it at home.

Q. You mean you take work home from the office?

A. Yes.

Q. But your office is at 10 East 40th Street?

A. That is right.

Q. Is your work the publication of this magazine, the writing of it?

A. That is right; I write it and Mr. Hunt, who is the chief editor, goes over, and we delete it or add to it and set it up.

By the Court:

Q. Where is it set up, in your place or at the printer's?

A. It is photo offset work, and we cut it up and paste it up just as you do for a newspaper, and then it is sent to the printer.

Q. And then after the printing, from what point is the distribution made?

A. We have plates at the National Process Company, people to send it to, and they will mail it out from there.

By Mr. Herwitz:

Q. Who compiles the statistics which appear in the magazine?

A. We do. The rayon statistics?

Q. Yes.

A. That is right.

Q. Do you do that at 10 East 40th Street?

A. Yes.

Q. You prepare charts which ultimately appear in the magazine?

A. Yes.

Q. What other work do you do? You said you do economic research, textile research?

A. That is right. We are very much interested, of course, [fol. 324] in all textiles; so that we look into the cotton situation, the silk, when we had it, as well as rayon. We are interested more in the markets, in the economic aspect rather than the technical. We are not a technical group.

Q. And do you maintain regular and continuous correspondence with your subscribers?

A. Not subscribers to the "Organon," except inasmuch as they may be rayon producers.

Q. And with whom do you maintain this correspondence?

A. With all the rayon producers, with duPont, Celanese, American Viscose Corporation.

Q. All over the country would that be?

A. Well, the letters are directed to certain men in their organizations, and they, of course, have plants all over the United States, and their headquarters compile that, and we receive the compilation.

Q. Mr. Stanley B. Hunt: Does he have any other business?

A. Well, we also have the Textile Surveys which does the same sort of statistical work for the rayon weaving industry, and that is up on the 44th floor.

Q. I see.

A. There is no publication involved in that.

Q. But the same type of business is carried on from there, with the exception of the fact that there is no magazine put out?

A. That is right.

By the Court:

Q. What is that room number?

A. That is 4402. That is under Textile Surveys. I am not sure.

Mr. Levin: That is 270 square feet.

The Court: 270?

Mr. Levin: That is right.

Mr. Herwitz: Would you accept his testimony with regard to this firm upstairs?

Mr. Levin: Certainly.

Mr. Proskauer: Except for the magazine.

Mr. Herwitz: Yes. That is all.

[fol. 325] Cross-examination.

By Mr. Proskauer:

Q. Do you have subscribers for this Rayon Organon?

A. We are on a fee basis from rayon producers. You might call this a form of advertising for anyone who is in the trade.

Q. Let me see if I have got it straight: Your organization, both of them you spoke of, are service organizations?

A. That is right.

Q. You make investigations and furnish the trade with information?

A. That is correct.

Q. Or charts, or whatever it is that give your information to the industry?

A. That is right.

Q. Mostly along non-technical but rather along economic and industrial lines?

A. That is right.

Q. And you get a fee for that for giving them that information?

A. That is correct.

Q. And you kind of throw in the Organon as an advertising to your trade?

A. That is right.

Mr. Herwitz: I would just like to have a sample of this marked for identification as Plaintiffs' Exhibit 28 for Identification.

(Marked Plaintiffs' Exhibit 28 for Identification.)

Mr. Herwitz: That is the Rayon Organon of September, 1942.

Mr. Proskauer: I have not quite finished.

Mr. Herwitz: I am sorry.

Q. This magazine, this Organon—you do not charge for it; you give it away to people who are on your list?

A. That is right.

Q. And the preparation of that is a very small part of your work, isn't it?

A. Very small part of my work.

Q. Almost negligible?

A. I should say that if I had to pin it down, it is about three days of my time to write it.

[fol. 326] Q. Three days out of a month?

A. Out of a month.

Q. And you are the only one who works on it, excepting this other gentleman who goes over it?

A. That is right.

Mr. Herwitz: I should like to have this other paper marked for identification as Plaintiffs' Exhibit 29.

The Court: What is it?

Mr. Herwitz: I am going to ask about that.

(Marked Plaintiffs' Exhibit 29 for Identification.)

Redirect examination.

By Mr. Herwitz:

Q. Will you tell me what this is?

A. Yes. That is a report of the fabrics that we receive, production of various types of rayon fabrics as classified by the OPA.

Q. What do you do with this report?

A. Well, that report is disseminated back to the contributors as information, and that is also published in the Organon, so there is nothing that is not available to the public.

Q. In other words, you distribute this paper to your contributors?

A. That is right.

Q. In various States outside of New York?

A. That is right.

Q. And where is it mailed from?

A. That is mailed from 10 East 40th Street.

Q. I see. And about how many of these do you mail in the course of a month?

A. I should say about—oh, it would go to about 200 different people. It represent about 200 mills.

Q. 200 mills?

A. Yes.

Q. And do you send just one sheet?

A. That is right. The vice-president, or the production executive, or the president of the company always has a book in which he puts those things.

Mr. Herwitz: I see. That is all.

[fol. 327] MORRIS SHENKER (115 West 79th Street, New York City, N. Y.), called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Herwitz:

Q. Do you work at 10 East 40th Street?

A. Yes.

Q. What is the name of your company?

A. Mercantile Credit Clearing Company.

Q. Do they occupy the suit 2101 and 2102?

A. Yes.

Mr. Herwitz: I have 875 square feet.

The Witness: They do not occupy it all. They rent some of it to accountants.

By the Court:

Q. What is the name of the firm?

A. The accountants?

Q. Yes.

A. Kirschner & Straell and William Schacknow.

Q. That is 2101?

A. And 2102.

The Court: What is the square feet?

The Witness: I do not know.

Mr. Levin: I could not divide it. We have 875 square feet for the entire suite. The witness might be able to help us on the division.

The Witness: About one-third—

Mr. M. Goldwater: Sublet?

The Witness: I sublet them, yes.

By Mr. Herwitz:

Q. What business is carried on by the Mercantile Credit Clearing Company?

A. Well, it is a credit reporting and collections business.

Q. Where are your customers?

A. Well, some are in New York City and some are out-of-town.

[fol. 328] By the Court:

Q. What is the percentage of New York City and out-of-town?

A. The same percentage.

Q. About 50-50?

A. 15 per cent.

Q. No; I am talking about the number, quantity.

A. About 10 per cent out-of-town and 90 per cent New York.

By Mr. Herwitz:

Q. These customers, are they people for whom you do collection work?

A. Collection work and credit work.

Q. Will you describe exactly how you carry on your work?

A. Well, you take the name, if it is for credit, and you write a letter in that particular town where the defendant or the debtor resides, and then I write to the bank for information. Then I write to others who are given as references; and when I assimilate all the information, I transcribe it and send them to the client.

Q. In other words, a client of yours may ask you credit information concerning somebody outside of New York State?

A. Yes.

Q. And you are describing how you get the information—

The Court: Or in New York State.

Q. Or in New York State?

A. Also in New York, yes.

Q. And that is how you get your information and transmit it to the client?

A. That is right.

Q. Now, you have some clients in New York and some clients out of New York, is that correct?

A. Yes.

Q. Do your clients out of New York usually make inquiry concerning persons in New York?

A. That is right.

Q. And then do you carry on the correspondence with your out-of-town clients?

A. Yes.

Q. Do you also carry on a correspondence with your [fol. 329] sources of information when the person you are checking is out-of-town?

A. Yes.

Q. And when I say out-of-town, I mean the same rule would apply where it was out-of-State?

A. That is right.

Q. And you say 10 per cent of your clients are out-of-State?

A. Yes.

Q. Now, how much of the persons which you check credit on would you say are out-of-State?

A. Well, about a dozen.

Q. Well, what percentage is that?

The Court: What percentage is that?

A. Of the total number of clients?

Q. I am not asking about clients—

By the Court:

Q. The total number of people on whom you seek to get information. What is that?

A. Oh, I could not say. Maybe, only as a guess, most of the work emanates from New York.

By Mr. Herwitz:

Q. Yes?

A. So I would say about one per cent.

Q. You mean if you have 90 per cent of your clients in New York, they seek in 99 per cent of the cases information concerning people in New York?

A. No; people throughout the country.

Q. I see.

A. But those that come in from out-of-State that seek for New York is only about one per cent.

Q. In these instances you said you carry on correspondence with persons out of New York State?

A. Yes, I carry on correspondence, as I said before, with the attorneys and the banks and the references.

[fol. 330] Q. How does your collection business work?

A. Well, we take the name of the lawyer to whom—I have a directory, a list of lawyers, and we write to these lawyers, transmit the information concerning the claim and the reports to us, and we, in turn, report to the client.

Q. Well, then, do you, in the course of your business carry on regular and continuous correspondence with attorneys, banks, in other parts of the country?

A. Yes.

Q. Would you be able to estimate the total volume of your business in the course of a year?

A. In dollars and cents, or in numbers?

Q. In dollars and cents.

A. Well, at one time it was \$75,000 a year, and now it is a bare minimum.

COLLOQUY

Mr. Proskauer: Before we adjourn, would you be willing to stipulate on the record, so we won't have to fill in these gaps here, that there are in the building about 24 lawyers or law firms occupying approximately 31,819 square feet?

Mr. Herwitz: I will accept that. I think that is approximately correct.

Mr. Levin: The total number of tenants, as I get it from the superintendent—he said there are 111 in the building at this time, and it is not substantially different from what it was last year.

Mr. M. Goldwater: You mean 110 leased space?

Mr. Levin: That is right, total lessees.

Mr. Proskauer: Let us get the fact. If there are 110, we will take it. Check it overnight and find out how many tenants there are.

Have we stipulated in the written stipulation on the vacancies?

Mr. Herwitz: I think we have stipulated on the rentable area, Judge.

Mr. Levin: Yes.

[fol. 331] Mr. Proskauer: That is in the written stipulation, your Honor.

Mr. Levin: The vacancies were approximately 11 per cent of the rentable space.

Mr. Herwitz: When, Judge?

Mr. Levin: Averaged through the period.

Mr. Herwitz: All right, we will accept that.

The Court: That would mean 111 lessees occupy 89 per cent?

Mr. Levin: That is correct. And the balance of the tenants would be spread over various endeavors, such as charitable organizations and retired business men, and people like that.

The Court: Well, we will adjourn to 10:30 tomorrow morning.

Mr. Proskauer: Let us leave it your Honor—if your Honor will pardon me for just a moment—that as to the tenants that neither side called, we will both agree that they are not material to the controversy one way or the other.

Mr. Herwitz: Naturally. The burden is on us to prove it, and if we have not called them, why, that is so.

Mr. Herwitz: If your Honor please, we have been unable to get as witnesses several of the tenants, either because we were not able to serve them, or because they have not responded to a subpoena.

The Court: Who are they?

Mr. Herwitz: I am going to read them:

National Products Refining Company, occupying suite 2803.

The Court: Space?

Mr. Herwitz: 900 square feet.

The Court: Yes?

Mr. Herwitz: Federal Seaboard Terra Cotta Corporation, Room 2409.

The Court: What is the square feet for 2409?

[fol. 332] Mr. Herwitz: 550.

The Court: And 2601?

Mr. Herwitz: 2150.

Mr. Levin: What number is that? 2609?

Mr. Herwitz: 2601.

The Court: The next one?

Mr. Herwitz: Chemical Marketing Company, 4409-10. 695 square feet.

The Court: Next.

Mr. Herwitz: Dusenbury & Dusenbury.

Mr. Levin: Are they still in the building?

Mr. Proskauer: What difference does it make?

Mr. Herwitz: 3702. 215 feet.

The Court: What is their business?

Mr. Herwitz: Well—

The Court: Well, never mind. Go ahead.

Mr. Proskauer: We are going to make a stipulation, your Honor, that will cover everything that is essential.

Mr. Herwitz: James Barr & Co., 2301. 1010 square feet.
Periodical Publishers Association, 3308-10, 1850 square feet.

City Industrial Corporation, 2408. 890 square feet.

New York Textile Plants, 3209-10. 1120 square feet.

Kane Import Company, 1608. 1030 square feet.

J. F. Langsdorf Company, Inc., room 1605. 1400 square feet.

The Court: Is that all?

Mr. Herwitz: That is all, your Honor.

Mr. Proskauer: With respect to those, the defendants will stipulate that if representatives of those firms were called they would testify that they conducted their businesses respectively on the premises in a manner substantially like that contained in the testimony of E. Kelly Downey, with respect to his business.

The Court: I remember Downey—

[fol. 333] Mr. Proskauer: He takes orders for coal and sells it, but there is not any production done there.

Mr. Proskauer: In connection with that Beech-Nut concession we are making, may I read just a paragraph or two or a question or two from the testimony of Mr. Foote taken before trial?

The Court: Yes.

Mr. Proskauer: It refers to the photographs which the witness said the boy was taking on the premises.

This is on page 113:

"Q. Does he take photographs there?

A. All photographs are taken outside. He uses this office on the seventh floor for his headquarters in New York City, as we do not have offices for him.

"Q. What does he do?

A. I'm not sure. The boy was out at our World Fair building and the President of the Company took a personal interest in him. He had some flare for photography and the President of our company is interested in photography and because of that association, this boy has been taking pictures of everything imaginable. The President sends him to take pictures of our machinery processing at Rochester, if for no other reason than to give the boy experience in taking pictures. These pictures have no practical use."

We were also to furnish your Honor with the area of 2508, which is occupied by Carl Byoir. That area is 715 square feet.

The Court: What was the other one?

Mr. Proskauer: Beech-Nut, on the seventh floor. 708. And the area is 815 square feet.

The Court: Now, does that conclude the testimony of the plaintiffs?

Mr. Herwitz: We have no other witnesses. We want to put some of the documents in evidence that were marked for identification.

Mr. Proskauer: Could we have a concession that the space which has not been testified to is generally occupied [fol. 334] by people in the insurance business, retired business men, a Christian Science practitioner, certain charitable organizations, certain real estate agents or operators, accountants, dentists, doctors and lawyers?

The Court: I thought you were going to cover that with another statement that any witnesses not called or not accounted for, it would be assumed that as to the space represented by those tenants, it was immaterial to the issues of this action.

Mr. Proskauer: I think we did stipulate to that.

The Court: The only thing that I wanted in that connection was what the total space was occupied by those persons not called as witnesses. In other words, taking the entire space in the building, and allowing for vacancies, and then taking the space which has been accounted for here either by testimony of witnesses or by this last stipulation made, it would leave a balance of square feet, and that balance would represent occupancy that had no materiality to the issues in this action.

Mr. Proskauer: That is people that were not engaged either in interstate commerce or—

Your Honor, I am a little concerned about the form of this stipulation about the balance of the testimony. We used the phrase "immaterial to the issue."

The Court: Well, you can fix it in any way you want. You can say not pertinent.

Mr. Proskauer: It is, pertinent in this respect, that if you are going to take an average proportion, that space would enter into it. But what it really comes down to is that the agreement is that those tenants engaged in the

character of business which would not make for a claim either for interstate commerce—

The Court: It is not pertinent to the plaintiffs' case?

Mr. Proskauer: Yes.

The Court: You do not want to be precluded from arguing that that space—

[fol. 335] Mr. Proskauer: That that space is neither engaged in interstate commerce nor in the production of goods for interstate commerce.

The Court: That is right.

Mr. Proskauer: And I understand that the concession reserves to me the right to argue that.

The Court: Well, I take it that that concession is made in lieu of placing you in a position to call all of these witnesses for the purpose of showing that they are not engaged in interstate commerce, or whatever you may want to show for the purpose of indicating that by that testimony that it is favorable to your side of this case.

Mr. Proskauer: That is exactly right, your Honor. I do not ask him to concede the fact. I asked him to concede that the witnesses, if called, would so testify.

The Court: Well, what do you mean "would so testify"? I think that ought to be elaborated a little bit.

Mr. Proskauer: Would testify that they were not engaged either in interstate commerce nor in the production of any goods on those premises for interstate commerce. They are generally of the category that I read to your Honor; charitable organizations, and so on.

Mr. Herwitz: I will concede the fact and object to the materiality of the testimony.

The Court: All right.

Mr. Proskauer: All right.

The Court: And I will overrule the objection.

The Court: Now, that is all, as I understand it, with respect to oral testimony on both sides, is that right?

Mr. Proskauer: I just want to put in one thing. I do not believe I need call a witness for it. And it would be subject to an objection of immateriality, because I say frankly to your Honor that it is no legal defense; that I am offering it merely to illustrate what I claim is a reasonable interpretation of the statute.

The Court: All right.

[fol. 336] Mr. Proskauer: I asked my accountant to take the lowest wage employee who worked over 40 hours. The wage of that employee was \$22 for a 48-hour week, and the hours were reduced to 47 hours a week in September, 1941. Now, if that man were paid in accordance with the schedules set forth in the Wage and Hour Law, the minimums, the man working at 25 cents an hour on a 44-hour week with 4 hours overtime from October 24, 1938, to October 23, 1939, would have received for his 44 hours at 25 cents per hour \$11; and for his 4 hours overtime at time and a half, \$1.50. So he would have received \$12.50 a week if we had strictly complied with the statute, when, in fact, he was getting \$22.

A man working at 30 cents hour—this is for the next period where the statute raises the ante.

The Court: Yes?

Mr. Proskauer: A man working at 30 cents an hour on a 42-hour week with 6 hours overtime from October 24, 1939, to October 23, 1940, would have received for 42 hours at 30 cents an hour \$12.60 a week, and for 6 hours overtime at time and a half, or 45 cents an hour, \$2.70, or \$15.30 a week as against the \$22 this man got.

A man working at 30 cents per hour on a 40-hour week with 8 hours overtime from October 24, 1940, to date, would receive for 40 hours at 30 cents per hour, \$12; and 8 hours at 45 cents per hour—that is time and a half—\$3.60, or \$15.60.

The Court: Whereas he received \$22?

Mr. Proskauer: \$22. And that is the lowest.

The Court: Minimum?

Mr. Proskauer: No. The \$22 is the lowest paid employee we have. The only man who worked over a 48-hour week was the watchman, who was paid \$35.50 for a 60-hour week, which was reduced to 59 in September, 1941. The calculations as to that watchman are, from October 24, 1938, to October 23, 1939, 44 hours at 25 cents an hour, and 16 [fol. 337] hours overtime at 37½ cents, would make a total of \$17 a week.

The Court: And he was paid what?

Mr. Proskauer: Paid \$35.50.

The Court: A week?

Mr. Proskauer: A week.

Making the same calculation for the raised period of October 24, 1939, to October, 1940, he would have received \$20.70 a week, and from October 24, 1940, to date he would have received under the Wage and Hour Act schedule \$21 a week. In fact, he was paid \$35.50 a week.

Mr. Herwitz: Of course, as Judge Proskauer said before he started, I object to the statement as immaterial and irrelevant for obvious reasons.

The Court: You will concede that if these two witnesses were called they would testify as to the amounts which they received, and that by a mathematical computation the sums which Judge Proskauer has stated would be the amount which they would be entitled to if the statute was applicable?

Mr. Herwitz: I will concede that if called they would testify as to the salary they received.

Mr. Proskauer: And the hours they worked?

Mr. Herwitz: And the hours they worked. I will not quibble with the mathematical calculation, but I take exception to all of that part of Judge Proskauer's statement having to do with the interpretation of the statute.

Mr. Proskauer: You concede the facts but claim they are irrelevant?

Mr. Herwitz: Yes; and I except to your statements concerning the interpretation of the law.

The Court: All right. I overrule your objection for the record, so you may have an exception.

Mr. Herwitz: All right.

Mr. Proskauer: That is all.

The Court: Now on the question of documentary proof. [fol. 338] Mr. Herwitz: One last thing, Judge Proskauer: We had the witness Mr. Meckbach from the Diesel Engine Division of the General Motors Corporation; and he testified concerning the gross sales—

Mr. Proskauer: Just state what you want. I will concede it.

Mr. Herwitz: Gross sales concerning parts, but he got off the stand so quickly we did not go into the fact that he also sells engines in addition to parts.

Mr. Proskauer: Yes. Those engines are not on the premises.

Mr. Herwitz: The engines are not on the premises, and they do not move in and out off the premises; and I would like a concession that the sales are made by him to cus-

tomers both in New York and outside of New York, and all engines manufactured outside of New York are delivered from the point of manufacture to customers outside of the state where manufactured.

Mr. Proskauer: Yes, I will concede that.

Mr. Herwitz: And that these sales are in a substantial amount.

Mr. Proskauer: I will concede that.

The Court: All right.

Mr. Herwitz: The plaintiff rests, your Honor.

MOTION TO DISMISS

Mr. Proskauer: I move to dismiss the complaint on the ground that the plaintiff has failed to prove a cause of action, has failed to prove the cause of action set forth in the complaint; and without limiting those general grounds, specifically on the ground that there is no proof whatever that any of the plaintiffs are engaged in interstate commerce or in the production of goods in interstate commerce in a manner that could make them subject to the Federal Wage and Hour Act.

The Court: I will deny that motion.

Mr. Proskauer: We except; and we rest; and we renew the motion on all the grounds stated.

Now, does your Honor want to hear argument now?

[fol. 339]

PLAINTIFFS' EXHIBIT 1

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT
OF NEW YORK

Civil Action File No. 19-514

CHARLES CALLUS, et al., etc., Plaintiffs,
against

10. EAST 40TH STREET BUILDING, INC., and CROSS & BROWN
COMPANY, Defendants

In order to shorten and facilitate the trial of the above entitled action,

It is Hereby Stipulated and Agreed by and between the attorneys for the respective parties as follows:

1. During the period covered by the complaint defendant 10 East 40th Street Building, Inc. (referred to herein as

"the defendant") has been the owner of a forty-eight (48) story and basement building located at 10 East 40th Street, New York, N. Y. (referred to herein as the "building"), and defendant's business has consisted of the management and operation of the building and the rental of space in the building to various tenants.

2. During the period covered by the complaint the gross rentable area in the building has been 234,435 square feet.

3. At any time up until the time of the entry of judgment in the above entitled action any employee or former employee not named as a plaintiff in the caption of the [fol. 340] action may be deemed a plaintiff to be bound by or have the benefit of the judgment in the action, as the case may be, upon filing in the action a duly executed written authorization to Charles Callus authorizing him to institute and maintain the action in behalf of the employee executing the instrument.

4. If the court finds on the whole case as a matter of law that the plaintiffs (and any other employee who shall have duly executed and filed the authorization pursuant to paragraph 3 of this stipulation) are entitled to judgment in the action, then each plaintiff, and other employee who shall have duly executed and filed an authorization pursuant to paragraph 3 of this stipulation, shall recover against defendant the amount set forth opposite his name in Schedule A annexed hereto, exclusive of such additional amounts as the court may award as liquidated damages. It is understood that the various amounts appearing in Schedule A annexed hereto have been computed and checked by Messrs. Gough & Bacon, Certified Public Accountants.

5. During the period covered by the complaint the various employees named in Schedule A annexed hereto were employed by and were employees of defendant.

6. During the period covered by the complaint the plaintiffs and such other employees as may file duly executed and acknowledged authorizations in accordance with paragraph 3 of this stipulation, have at all times performed such customary duties in connection with the maintenance and operation of the building as the furnishing of heat and hot water, the keeping of elevator, radiator, water, and fire sprinkler systems in repair; the maintenance of electric

light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and [fol. 341] clients of tenants, and other passengers, as well as office furniture and equipment, to and from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks.

7. During the period covered by the complaint all of the tenants in the building have regularly and continuously had the benefit of and made use of the facilities indicated by the duties performed by plaintiffs and other employees as enumerated in paragraph 6 of the stipulation.

8. The facts disclosed by the evidence or agreed to by this stipulation with respect to the activities of tenants occupying space in the building on January 1, 1943 shall be considered to have obtained continuously since October 24, 1938.

9. During the period covered by the complaint a substantial number of tenants occupying a substantial amount of space in the building has regularly and continuously made use of the mails, telephone, telegraph and other instrumentalities of interstate commerce to communicate between offices in the building and various points outside of the State of New York.

10. Plaintiffs' attorney has performed or will have performed services reasonably worth the sum of \$7,500, including such services as may be necessary in connection with the conduct of any appeal or appeals which may be taken in the action, and if plaintiffs recover as a matter of law upon the whole case, then judgment for plaintiffs shall [fol. 342] include the said sum of \$7,500 as a reasonable attorney's fee.

Dated, New York, N. Y., March 18th, 1943.

Victor J. Herwitz, Attorney for Plaintiffs.

Proskauer, Rose, Goetz & Mendelsohn, Attorneys for Defendant, 10 East 40th Street Building, Inc.

SCHEDULE A

<i>Name</i>	<i>Position</i>	<i>Amount</i>
J. Rayzak	Chief Mechanic	\$583.07
J. Smyth	Mechanic	408.22
R. Murden	Mechanic	202.03
M. DeTroy	Handyman	400.41
F. Baldwin	Watchman	18.93
C. McKee	Watchman	498.13
P. Chambers	Starter	403.32
F. Lange	Assistant Starter	358.72
P. Saggese	Elevator Operator	266.35
W. DeTroy	Elevator Operator	280.66
T. Rosso	Elevator Operator	263.99
D. Shea	Elevator Operator	287.47
S. Sanchez	Elevator Operator	284.48
J. Farrugia	Elevator Operator	270.32
B. Harney	Elevator Operator	255.28
E. Cisek	Elevator Operator	69.76
S. Kurc	Elevator Operator and Window Cleaner	200.43
E. Vecchione	Elevator Operator	280.50
T. Quig	Elevator Operator	179.04
T. Barber	Elevator Operator	94.21
J. Farrell	Elevator Operator	37.59
[fol. 343]		
L. Saggese	Elevator Operator	213.80
G. Greck	Elevator Operator	294.37
J. Baran	Assistant Head Porter	289.56
S. Baley	Porter	257.85
C. Bonnicci	Porter	221.76
J. Cefai	Porter and Painter	309.39
L. Zammit	Porter	67.22
J. Vartabedian	Porter	275.84
A. Chivelly	Porter	282.47
F. Colangelo	Porter	283.24
J. Michalicka	Porter	279.16
C. Borg	Porter	250.60
C. Callus	Porter	280.70
P. Macredi	Porter	284.89
W. Mass	Porter	172.13
G. Ortiz	Porter	283.26
F. Mueller	Porter	95.77
F. Voscinar	Porter and Elevator Operator	265.89

<i>Name</i>	<i>Position</i>	<i>Amount</i>
F. Kassab	Porter	287.36
J. Ortiz	Porter and Watchman	581.90
E. Hegerty	Matron	22.92
I. Mika	Window Cleaner	356.01
K. Tarlach	Window Cleaner	157.51
E. Dellinger	Painter	8.75
O. Schlaak	Elevator Operator	105.20
R. Demin	Porter	67.07
G. Kerr	Porter	147.99
R. Page	Elevator Operator and Porter	81.09
M. Rapcik	Matron	204.97
A. Breglia	Elevator Operator and Porter	175.32
V. D'Amico	Porter and Elevator Operator	6.95
R. Beechel	Night Superintendent	437.86
C. Page	Porter and Elevator Operator	13.39
F. Falzon	Porter	1.16
A. Kassabian	Head Porter	249.44
J. Kessler	Elevator Operator	17.50
S. Mitchell	Porter	193.37
E. Galea	Porter and Elevator Operator	20.03
[fol. 344]		
E. Killian	Elevator Operator	118.52
P. Ohan	Porter	158.38
B. Harris	Elevator Operator	97.54
C. Kozak	Porter	1.73
T. Connolly	Porter	4.63
A. Micaleff	Window Cleaner	123.18
G. Orosz	Porter	73.64
J. Herrera	Porter	15.12
J. Barbara	Porter	74.99
J. Quinn	Elevator Operator	4.31
S. Said	Porter	38.73
E. Hauser	Elevator Operator	8.64
C. Calabrese	Elevator Operator	5.55
F. Clunan	Elevator Operator	8.64
T. Callahan	Elevator Operator	44.14
F. Zabawczuk	Elevator Operator	15.51
J. Orosz	Porter	23.40
J. Traynor	Porter	21.53
T. Joyce	Porter	21.25
A. Phillips	Elevator Operator	6.48
M. McClelland	Elevator Operator	8.33

<i>Name</i>	<i>Position</i>	<i>Amount</i>
J. Spiteri	Elevator Operator	8.33
A. Vogel	Elevator Operator	6.17
S. Fiorenza	Elevator Operator	6.17
E. W. Spiteri	Porter	6.17
J. Law	Elevator Operator	4.01

[fol. 345] IN UNITED STATES DISTRICT COURT

Victor J. Herwitz, Esq., Attorney for Plaintiffs.

Monroe Goldwater, Esq., James' Goldwater, Esq., of Counsel.

Proskauer, Rose, Goetz & Mendelsohn, Esqs., Attorneys for 10 East 40th Street Building, Inc., Joseph M. Proskauer, Esq., and Harold H. Levin, Esq., of Counsel.

OPINION

HULBERT, D. J.:

51 plaintiffs brought this action on behalf of themselves and other employees and former employees of the defendant 10 East 40th Street Building, Inc. similarly situated for the recovery authorized by Section 16 (b) of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Section 201 et seq.).

The Statute will hereinafter be referred to as the "Act."

The case was tried by the Court without a jury on March 16th, 18th, 19th, 22nd, 23rd and 24th.

At the opening of the trial the action was severed as to the defendant Cross & Brown Company and the 10 East 40th Street Building Corporation will hereafter be referred to as the defendant.

There was a partial stipulation as to the facts, including the amount to which the plaintiffs would be entitled if the Court found in their favor.

55 witnesses were called by the plaintiffs for the purpose of showing the area of occupancy and the character of business transacted by each tenant.

There is no substantial dispute of the facts, except as to the inferences to be reasonably drawn therefrom. The issue is whether the plaintiffs, and others, employed by the defendant, as service and maintenance employees, were

[fol. 346] engaged in commerce or in the production of goods for commerce within the meaning of the Act.

FINDINGS OF FACT

(1) The defendant is a New York corporation having its principal place of business at 10 East 40th Street, New York, N. Y.

(2) The defendant is the owner of a 48-story and basement office building located at 10 East 40th Street, New York, N. Y.

(4) Defendant's business has consisted of the management and operation of said building, the leasing of space therein to various tenants, and the rendition of the usual type of service incident to the operation and leasing of space in an office building in New York, N. Y.

(4) During the period covered by the complaint plaintiffs were hired by the defendant as maintenance employees of its said office building.

(5) The gross area of said office building available for rental was 234,245 square feet, of which 11 per cent had been unoccupied.

(6) The rentable area of the building has been leased by defendant to, and occupied by, approximately 111 tenants, viz.:

Class 1. Executive and sales offices of 20 concerns, carrying on elsewhere the business of manufacturing and mining, occupy 25.8% of the rented area.

Class 2. Offices of sales agencies representing 17 manufacturers and mining concerns, carrying on elsewhere [fol. 347] where the business of manufacturing and mining, occupy 9.3% of the rented area.

Class 3. 24 lawyers, or law firms, occupy 13.6% of the rented area.

Class 4. The United States Employment Service, an agency of the United States of America, affiliated with the War Man Power Commission, occupies 13.6% of the rented area.

Class 5. 10 advertising agents and publicity and trade organizations occupy 6.6% of the rented area.

(8 tenants, included in Class 1 and Class 2 also arrange for advertising or maintain advertising departments, in addition to other administrative, sales and other activities.)

Class 6. 7 tenants whose business is engineering and construction occupy 8.9% of the rented area.

Class 7. 5 private investments, financing and credit organizations occupy 4.7% of the rented area.

Class 8. Executive offices of 5 import and export concerns occupy 3.7% of the rented area.

Class 9. 22 miscellaneous tenants, whose business is not of an interstate character, occupy 3.3% of the rented area.

(7) The services rendered and the work done in the defendant's office building by the officers, agents and/or employees of the tenants encompass the following:

Class 1. Manufacturing and mining companies in this class use their offices for executive and administrative activities, for conferences, and for taking orders for substantial quantities of merchandise of substantial value produced and shipped from their factories and mines elsewhere located to customers in various states. Seven of these companies carry on advertising or public [fol. 348] work in their offices—in some cases, in separate advertising departments. Generally, the advertising copy is written and, in every case, all printing is done outside of the building.

Class 2. Sales agencies of manufacturing and mining companies use the offices in the building, to sell a variety of the products of the companies they represent. Orders are taken and are forwarded by mail, telephone, teletype or other means of communication to factory and mines located in various states for shipment of goods to various parts of the country. As a result of the efforts of these agencies, substantial amounts of merchandise of substantial value are shipped across state lines from factories, mines and warehouses, elsewhere located in various parts of the country.

Class 3. The lawyers and law firms in this class carry on the usual activities incident to the practice of law.

Class 4. The United States Employment Service places white collar workers in various factories and business houses. Practically all the registrants served by this agency are located in the State of New York, and about 96% of the placements are within the State of New York, of whom about 2% result from referrals from out-of-state branches of the U. S. E. S. in other cities through a nationwide trade job clearance system.

Class 5. The advertising agents carry on publicity and advertising work using national publications, newspapers and radio.

A single publishing firm receives stories for fiction magazines which are sold all over the country. These magazines are printed off the premises and are delivered by the printers to an outside firm which distributes them. The work in the building herein consists [fol. 349] of the purchase and receipt of scripts, the examination and correction of same and the regular business and financial activities of the firm.

The officers and employees of the trade organizations are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

Class 6. Engineering and construction firms carry on their correspondence and executive and administrative activities, including financing, collection work and estimating on and submission of bids. In some cases, plans are received for approval which are prepared outside of the building, and in other cases, the officers, agents and employees of these tenants prepare plans and sketches in the building for construction projects located in various parts of the United States and in foreign countries. All blue prints are made by blue-printing firms elsewhere located.

Class 7. Investment, financing and credit organizations use their offices in the building herein for their executive and administrative work, conferences, correspondence, keeping of records, arranging for loans, and receiving reports concerning the same. The invest-

ments, financing and credit work is done in connection with the businesses and projects located in various parts of the country.

Class 8. Executive offices of import and export concerns make arrangements for export and import of a variety of goods of substantial value. The goods are stored at and shipped from places other than the building herein.

Class 9. Miscellaneous tenants include accountants, a Christian Science Practitioner, dentists, charitable [fol. 350] organizations, and other firms, organizations and individuals whose activities are not interstate in character.

(8) There is no manufacturing of any kind carried on in the office building in question, and the percentage of labor and space actually utilized in the building by employees of any of the tenants in connection with the publicity and advertising prepared in or outside of the building has not been mathematically computed, but in relation to the entire volume of business transacted and carried on by the tenants at and from said premises is not substantial.

(9) An average of 50 to 60 persons, including plaintiffs, engaged as maintenance employees of said office building, have engaged in such capacities as elevator starters, elevator operators, window cleaners, watchmen, mechanics and handymen.

(10) These employees have performed the customary duties incident to the effective maintenance and operation of this office building, such as the furnishing of heat and hot water; keeping the elevators, radiators, water and fire sprinkler systems in repair; the maintenance of electric light power systems and appliances; the operation of elevator carrying tenants and employees, customers and clients of tenants, and other passengers; carrying advertising matter, publicity releases, photographic material, magazine layouts, commercial art drawings, printers' and lithographers' proofs, construction plans and specifications, Diesel engine parts, Ediphone machines and parts, samples of merchandise, office furniture and equipment and supplies to and from tenants' premises; protection of the building in tenants' quarters from theft, fire and other damage;

repair of hallways, stairways and other common parts of the building; the keeping of the building in tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and other related tasks...

(11) The labor of the defendant's building service employees has been performed as a useful adjunct and a necessary incident to the successful and efficient operation of said office building and to enable the various tenants to conduct their activities conveniently and efficiently, and said tenants have regularly and continuously had use of and derived the intended benefit from the various facilities so provided.

(12) The plaintiffs and the other building service maintenance employees of the defendant were not compensated for the hours they worked in excess of the standard work week hours provided for by the Act, at the rate of time and one-half for such overtime. However, the lowest paid individual plaintiff and the individual plaintiff working the longest number of hours per week were paid amounts in excess of what they would have received had they been paid the minimum wages for standard hours as provided by the Act and one and a half times such minimum hours worked in excess of such standard hours.

(13) Plaintiffs and the other building service employees of the defendant were not engaged in producing, manufacturing, mining handling, transporting or in any other manner working on goods of any kind. Nor were they substantially engaged in activities having a close or immediate tie with the production of goods of any kind.

(14) Plaintiffs have not been engaged in trade, commerce, transportation or transmission among the several states or from any state to any place outside thereof.

[fol. 352] Conclusions of Law

(1) Jurisdiction was conferred upon this Court by Section 24 of the Judicial Code (Title 28 U. S. C. A., Section 41 (8)).

(2) None of the plaintiffs or any of the other building maintenance employees of the defendant have been engaged in interstate commerce or in the production of goods for

commerce within the meaning of the Fair Labor Standards Act of 1938.

(3) The Fair Labor Standards Act of 1938 is not applicable to the plaintiffs' employment.

(4) Plaintiffs have failed to establish a cause of action.

(5) The defendant is entitled to judgment dismissing the complaint and the action.

Discussion

In view of Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723 (c), it is now generally regarded as superfluous for the trial judge to write a considered opinion in a non-jury cause, and there is less reason to do in this case in view of the recent decision by my colleague, Judge Leibell, in *Hinkler v. Eighty-three Maiden Lane Corporation*, Civ. 20-94, decided May 14, 1943.

Since it is sought by this action to extend the principle applied in *Kirschbaum v. (and Arsenal) v. Walling*, (two cases), 316 U. S. 517, in both of which claims of employees, rendering maintenance and operating services in loft buildings principally devoted to the manufacture of goods for commerce, as defined in the Act, were held to be within its provisions, it might be well to point out the current cases in which the district courts have refused to apply the Act in favor of maintenance employees in office buildings. Apparently the first such case was *Johnson, et al. v. Dallas Downtown Development Co.*, affirmed 132 Fed. (2d), page [fol. 353] 287 (C. C. A. A. 5); cert. denied by the Supreme Court on April 19, 1943 (87 L. Ed. 822).

Of course, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *U. S. v. Carver*, 260 U. S. 482, 490; *Atlantic Coast Line Railroad Company v. Powe*, 283 U. S. 401.

In *Aguilar v. Standard Oil Company of New Jersey*, 130 Fed. (2d) 154 (C. C. A. 2), a petition for certiorari was denied (87 L. Ed. 132), but, the Supreme Court after having subsequently granted certiorari (87 L. Ed. 294) in *Waterman Steamship Company v. Jones*, 130 Fed. (2d) 797 (C. C. A. 3), wherein a contrary decision had been rendered, upon its own motion vacated its original order denying certiorari in the *Aguilar* case (87 L. Ed. 799).

However, the denial of certiorari in the Johnson case provokes an examination of the record to determine, by comparison, whether or not there is any similarity in the issues of fact to the case at bar; and, it appears to be of some significance that when certiorari was denied in the Johnson case the Supreme Court had already reversed (87 L. Ed. 423) *Overstreet v. North Shore*, 128 Fed. (2d) 550 (C. C. A. 5) decided by the circuit court before its decision in the Johnson case.

Quite as recent is the case of *Stoike v. The First National Bank of the City of New York*, 290 N. Y. 195 (chiefly relied upon by Judge Leibell).

Other cases involving employees of an office building in which the courts have held that the Act does not apply to its maintenance employees are set forth in a footnote.¹

[fol. 354] The only cited case in which the employees of an office building have been held to be within the Act is *Lorenzetti v. American Trust Co.*, N. D. Cal. S. D., 45 Fed. Supp. 128; appeal pending (C. C. A. 9).

Counsel for the plaintiffs specifically directed my attention to a decision of this Court granting injunctive relief on an application by Walling, as Wage Administrator v. *Casale, Inc.* (6 Labor cases C. C. H., par. 61524), in which case, instituted by *Snyder v. Casale, Inc.*, this Court had previously denied defendant's motion for summary judgment. In granting the injunctive relief in the *Casale* case, my colleague, Judge Knox, pointed out:

"That business, as now carried on, could not continue without interruption, confusion and delay if, for example, defendant's employees should go on strike"

¹ *Lofther v. First Nat. Bank of Chicago*, N. D. Ill. E. D., 48 Fed. Supp. 692;

Patterson v. Memphis Cotton Exchange R. Co. Inc., Tenn. Ch. Ct. 6 W. H. R. 308;

Brandell et al. v. Continental Ill. Nat. Bank & Tr. Co., N. D. Ill. E. D., 43 Fed. Supp. 781;

Cochran v. Florida Nat. Bldg. Corp., S. D. Fla., Miami Div., 45 Fed. Supp. 830;

Tate v. Empire Bldg. Corp., U. S. D. C. Eastern D. Tenn., 5 W. H. R. 475;

Johnson v. Masonic Bldg. Co., S. D. Ga., 6 W. H. R. 19.

where the lessees

"engaged in a substantial amount of business in interstate commerce."

In the above case (*Snyder v. Casale, Inc.*) the plaintiffs were employees of a garage which serviced trucks operated by the defendant, some at least in the transportation of merchandise over state lines and it is obvious that the relationship of the employees of the garage was more than tenuous; but in the case at bar the plaintiffs have not handled goods in interstate commerce or in the process of production therefor, except in a few cases of samples entering or leaving the building or in other isolated instances such, for example, as the Ediphones and Diesel parts.

As Mr. Justice Frankfurter pointed out in the *Kirschbaum* case, *supra*:

[fol. 355] "There are no fixed points, though lines are to be drawn"

by

"the gradual process of inclusion and exclusion. . . . And what is reasonably clear in a particular situation is not to be over-borne by . . . suggesting doubtful and extreme cases"

which would be disposed of by drawing lines and by using

"something of that common sense accommodation of judgment of kaleidoscopic situations."

In *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, Mr. Justice Roberts said, at page 94:

"The labor of the man who made the tools which drilled the well, that of the sawyer who cut the wood incidentally used, that of him who mined the iron of which the tools were made, are all just as necessary to the ultimate extraction of oil as the labor of petitioners. Each is an antecedent of the consequent,—the production of the goods for commerce. Indeed, if respondents were not fed, they could not have drilled the well, and the oil would not have gone into commerce. Is the cook's work 'necessary' to the production of the oil, and within the Act?"

In the times in which we are living the Court should, I think take judicial notice of the fact that the executives and other representatives of many industries, National and International, visit Washington and New York and other cities and carry on their respective business activities in rooms at the hotels of which they are guests. Would it not be quite as logical to say that the building maintenance employees of these hostelryes, as well as the plaintiffs in this action, are within the Act?

[fol. 356] Upon the record this court has felt impelled to draw the line as stated in its findings of fact and conclusions of law.

_____, U. S. D. J.

Dated, New York, May —, 1943.

IN UNITED STATES DISTRICT COURT

Plaintiff's Proposed Findings of Fact and Conclusions of Law

This action having been tried by the court without a jury, the court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant 10 East 40th Street Building Inc. (referred to hereafter as "the defendant") is a corporation organized under and existing by virtue of the laws of the State of New York, having a principal place of business at 10 East 40th Street, New York City.

2. During the period covered by the complaint defendant has been the owner of a 48-story and basement office building located at 10 East 40th Street, New York City (referred to herein as "the building"). Defendant's business has consisted of the management and operation of the building and the rental of space in the building to various tenants.

[fol. 357] 3. The gross area available for rental in the building has been 234,435 square feet, of which 11% (25,788 square feet) represents average vacancies. Therefore, the

total space rented to, and occupied by tenants has been 208,647 square feet.

4. During the period in question 89% of the gross rentable area in the building has been leased by defendant to and occupied by 111 tenants, including a substantial number of manufacturing and mining companies and concerns, sales agents of manufacturers and mining concerns, import and export firms, advertising, publicity and trade organizations, engineering and construction firms, lawyers and law firms, tenants engaged in investment, financing and credit businesses and the United States Employment Service.

5. Included among the tenants at all times have been the following:-

(a) Offices of 20 manufacturing and mining companies occupying 25.8% of the gross rentable area or 29.0% of the occupied space in the building.

(b) Offices of 17 sales agents for manufacturing and mining companies and concerns occupying 9.3% of the gross rentable area or 10.4% of the occupied space in the building.

(c) Offices of 5 export and import agents and concerns occupying 3.7% of the gross rentable area or 4.2% of the occupied space in the building.

(d) Offices of 10 advertising agents, publicity firms and trade organizations occupying 6.6% of the gross rentable area or 7.4% of the occupied space in the building.

[fol. 358] (e) Offices of 7 engineering and construction firms, occupying 8.9% of the gross rental area or 9.9% of the occupied space in the building.

(f) Offices of 5 tenants engaged in investment, finance, credit and similar businesses occupying 4.1% of the gross rentable area or 4.7% of the occupied space in the building.

(g) An office of the United States Employment Service, an agency of the United States Government affiliated with the War Manpower Commission occupying 13.6% of the gross rentable area or 15.3% of the occupied space in the building.

(h) Offices of 24 lawyers or law firms, occupying 13.6% of the gross rentable area or 15.3% of the occupied space in the building.

(i) Offices of 22 tenants engaged in miscellaneous businesses not interstate in character occupying 3.3% of the gross rentable area or 3.8% of the occupied space in the building.

6. During the period covered by the complaint manufacturing and mining companies and concerns occupying space in the building for their offices have been engaged at factories, mines and mills in various states of the United States, mostly outside the State of New York, in manufacturing and producing for interstate commerce substantial quantities of printed and lithographed products, including posters, window and counter displays, booklets, folders, wrappers, cartons, labels, calendars and other advertising and packaging materials involving lithographing or rotogravure printing work; photographic supplies and equipment; food products and confections; magazines and publications; Diesel engines and parts; plastic products; [fol. 359] Ediphone machines; textiles and textile products; food concentrates; wooden boxes, box parts and by-products; women's hosiery and underwear; flexible shafting for use in engines and similar engine devices; bags used as linings for cartons, containers and packagings; silverware; men's shirts, ties, collars, handkerchiefs, underwear and similar articles of attire; cotton bags; chemical products; brass and copper lighting and plumbing fixtures, containers and closures; feldspar, mica, flint, quartz and other minerals.

7. During the same period sales agents occupying space in the building for their offices have represented manufacturing and mining companies and concerns engaged at factories, mines and mills in various states of the United States, mostly outside the State of New York, in manufacturing, mining and producing for interstate commerce substantial quantities of coal; rayon acetate yarns; antimony metals and antimony oxide; cigars, cigarettes and tobacco; paper; collapsible tubes and plastic bottle caps.

8. During the period covered by the complaint various officers, agents and employees of manufacturing and min-

ing companies and concerns occupying space in the building for their offices have been there regularly and recurrently engaged in the following activities:

(a) Various functions constituting a necessary and integral part of the manufacturing and production for interstate commerce of various goods and commodities at factories and mills of such companies and concerns in various states of the United States, including such activities as the creation of designs and lay-outs subsequently identically reproduced at out-of-state plants for interstate distribution, purchasing of raw materials [fol. 360] and supplies essential to manufacture of nationally distributed products, taking of specifications for goods to be produced to order, transmitting production instructions to out-of-state plants, formulation of advertising and selling programs, planning and coordinating productive operations. All of these functions have been essentially related to and indispensable to the successful and efficient conduct of industrial enterprises producing goods for interstate commerce.

(b) Placing of orders, conducting of negotiations, executing of contracts and making of arrangements for the purchase of various raw materials pursuant to which such raw materials have been shipped and delivered in interstate commerce from suppliers in various states of the United States to factories and mills in various other states of the United States. Raw materials so purchased have an aggregate annual value of several millions of dollars.

(c) Taking orders, conducting negotiations, executing contracts and making arrangements for the sale of various finished products described above pursuant to which such products have been shipped and delivered in interstate commerce from factories, mines and mills in various states of the United States to customers in various other states of the United States and foreign countries. Products so sold have an aggregate annual value of many millions of dollars.

(d) Gathering and preparing advertising and publicity information and materials and communicating and distributing substantial quantities of such informa-

tion and materials across state lines to points in various states of the United States.

[fol. 361] (e) Preparation and production of commercial art designs, advertising copy, models for packagings and containers, photographic prints, textile designs, publicity releases, magazine lay-outs and similar materials and articles intended to be and subsequently actually transmitted and delivered across state lines in substantial quantities from the building.

(f) In connection with all of the foregoing activities, regularly and continuously using the mails, telegraph, telephone, teletypewriter and teleprinter services and similar instrumentalities to communicate for business purposes between offices in the building and points in various states of the United States outside the State of New York.

9. During the period covered by the complaint various officers, agents and employees of sales agents, representing manufacturing and mining concerns, occupying space in the building for their offices have been there regularly and continuously engaged in the following activities:

(a) Taking orders, conducting negotiations, executing contracts and making arrangements for the sale of various finished products described above pursuant to which such products have been shipped and delivered in interstate commerce from factories, mines and mills in various states of the United States to customers in various other states of the United States and foreign countries. Products so sold have an aggregate annual value of many millions of dollars.

(b) Communicating and distributing substantial quantities of advertising and publicity information [fol. 362] and materials across state lines to points in various states of the United States.

(c) In connection with the foregoing activities, regularly and continuously using the mails, telephone, telegraph, teletypewriter and teleprinter services and similar instrumentalities to communicate for business purposes between offices in the building and points in

various states of the United States outside of the State of New York.

10. During the period covered by the complaint various officers, agents and employees of import and export firms occupying space in the building for their offices have been there regularly and continuously engaged in the following activities:

(a) Taking orders, conducting negotiations, executing contracts and making arrangements for the purchase and sale of various products and commodities, including batteries, spark plugs and Ediphone equipment, paper and pulp, chemicals and oils, spices and cotton linters, pursuant to which such products and commodities have been shipped and delivered in interstate commerce from factories, warehouses and mills in various states of the United States to customers in various other states of the United States and foreign countries. Products so purchased and sold have an aggregate annual value of several millions of dollars.

(b) Preparing bills of lading, shipping documents and shipping instructions and otherwise arranging for and facilitating interstate movement of such products and commodities.

(c) In connection with the foregoing activities, regularly and continuously using the mails, telephone, telegraph, teletypewriter and teleprinter services and similar instrumentalities to communicate for business purposes between offices in the building and points in various states of the United States outside the State of New York.

11. During the period covered by the complaint the various officers, agents and employees of advertising agents and publicity firms and trade organizations occupying space in the building for their offices have been there regularly and recurrently engaged in the following activities:

(a) Preparing, laying out, editing, writing copy for, checking and correcting proofs of, and similar work upon magazines and publications, advertising and publicity materials, copy, lay-outs and displays, radio scripts, press releases and trade association publica-

tions, reports, bulletins and statistical tables, and taking, developing and printing photographs and prints. Substantial quantities of such materials and articles have been intended to be and have actually been, subsequent to the work performed upon them in the building, transmitted and delivered across state lines from the building.

(b) In connection with the foregoing activities, regularly and continuously using the mails, telephone and telegraph to communicate for business purposes between offices in the building and various states of the United States outside of the State of New York.

12. During the period covered by the complaint various officers, agents and employees of engineering and construction firms occupying space in the building for their offices have been there regularly and recurrently engaged in the following activities:

[fol. 364] (a) Drafting and preparation of plans and specifications subsequently forwarded, either as prepared or after blueprinting outside the building, to architects, building owners and construction personnel at various job sites outside of the State of New York.

(b) Arranging for and facilitating the movement of personnel between offices in the building and job sites in various states of the United States outside the State of New York in connection with supervision of construction at such job sites.

(c) In some instances, interviewing and engaging personnel numbering several thousands for work upon projects outside of the United States, and arranging passage and other matters related to the removal of persons so hired from points within the United States to job sites outside of the United States.

(d) From time to time completing financing arrangements for the forwarding of funds to banks in other states to meet payrolls and operating expenses on out-of-state jobs; performing general accounting work in connection with construction projects in various states of the United States and foreign countries; purchasing, requisitioning or expediting materials and equipment

for shipment in interstate commerce from points in various states of the United States to points in various other states of the United States. Materials and equipment so purchased and requisitioned have an aggregate annual value of many hundreds of thousands of dollars.

[fol. 365] (e) The construction projects to which these activities relate involve an annual cost of many millions of dollars.

(f) In connection with all of the foregoing activities, regularly and continuously using the mails, telephone and telegraph to communicate for business purposes between offices in the building and points in various states of the United States and foreign countries.

13 During the period covered by the complaint various officers, agents and employees of tenants engaged in investment, finance, credit and similar businesses occupying space in the building for their offices have been there engaged in the following activities:

(a) Regularly and continuously communicating across state lines for business purposes by use of the mails, telephone and telegraph in connection with furthering business transactions with customers in various states of the United States outside of the State of New York.

(b) From time to time issuing bank checks, financial statements, credit information and reports and similar documents and communications intended to be and subsequently actually transmitted from the building across state lines to customers, clients, correspondents and personnel traveling in the field in various states of the United States outside of the State of New York.

14. During the period covered by the complaint various representatives and employees of the United States Employment Service, a branch or agency of the United States Government affiliated with the War Manpower Commission, [fol. 366] occupying space in the building have been there regularly engaged in the following activities:

(a) The supplying of white-collar help, including models, bookkeepers, officeworkers, designers, drafts-

men, engineers, technicians and similar technical and clerical employees, to offices, plants and factories both within and without the State of New York, a substantial number of which are engaged in the manufacture and production of goods for interstate commerce.

(b) Of approximately 50,000 placements made annually, referral of about 2,000 employees to jobs outside of the State of New York.

(c) Of about 50,000 placements made annually, placement of 1,000 to 2,000 additional employees in jobs within the State of New York as a result of referrals from out-of-state branch offices of the United States Employment Service in other cities, through the operation of a nationwide job clearance system.

15. Press releases, photographic prints, advertising matter and similar materials created, prepared or otherwise worked upon in the building by various tenants have subsequently appeared in various publications, including magazines such as the Saturday Evening Post, enjoying national and international circulation, trade journals and scientific publications distributed throughout the country and newspapers from coast to coast. An aggregate total of millions of copies of such newspapers, magazines and other publications containing identical reproductions of publicity releases, photographs and advertising matter prepared and worked upon in the building are distributed annually throughout the United States.

[fol. 367] 16. Advertising and publicity matter created, prepared or otherwise worked upon in the building by various tenants has advertised and publicized the goods of many manufacturers and products of nationally distributed products, including Coca Cola Company, DuPont, Eastman Kodak Company, Beechnut Packing Company, Aluminum Company of America, Libby-Owens Company, Pullman Company, Willys-Overland and Atlantic & Pacific Tea Company.

18. The preparation of copy, the formulation of layouts, correcting of printers' and lithographers' proofs, creating of commercial art work and similar work performed in the building by various tenants constitutes an initial step in the publication of magazines, trade publications and litho-

graphed items, substantial quantities of which have subsequently been distributed in interstate commerce throughout the United States. Such creative and editorial work has been performed in the building in connection with materials subsequently reproduced annually in more than 25 million copies of some 65 magazines and publications distributed nationally and millions of copies of lithographed materials similarly distributed throughout the United States.

19. In the maintenance and operation of the building defendant has employed during the period in question an average of 50 to 60 building maintenance employees, including plaintiffs, in such capacities as elevator starters, elevator operators, window cleaners, watchmen, mechanics, handymen and painters.

20. These employees have performed at all times such customary duties in connection with the effective maintenance and operation of the building as the furnishing of heat and hot water; the keeping of elevator, radiator, water [fol. 368] and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as office furniture and equipment, to and from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks.

21. All of the various tenants of the building, indiscriminately, in connection with the carrying on there of their various businesses, have regularly and continuously had the benefit of and made use of the various facilities provided and maintained by plaintiffs and other building service workers employed by defendant.

22. The work of the plaintiffs and other building service employees of defendant has at all times been essential to the maintenance of clean, safe and habitable working quarters for the officers, agents and employees of the various tenants occupying space in the building.

23. The work of defendants building service employees has been performed at all times as a useful adjunct and

a necessary incident to the successful and efficient conduct of the businesses carried on in the building by the various tenants.

24. The work of plaintiffs and similar employees of defendant has been performed at all times with the object and necessary effect of furthering the businesses carried on in the building by the various tenants by permitting them to conduct their activities conveniently and efficiently.

[fol. 369] 25. The work of the defendants building service employees, including plaintiffs, has at all times possessed a close and immediate tie with the businesses of the various tenants, contributing materially to and thus constituting an essential part of the activities carried on in the building by the tenants.

26. The building elevators have been regularly used by the tenants to carry advertising matter, publicity releases, photographic materials, magazine lay-outs, commercial art drawings, printers' and lithographers' proofs, construction plans and specification, Diesel engine parts stocked in the building, Ediphone machines and parts ordered and received from out-of-state, samples of merchandise for which orders are taken in the building and office supplies. Substantial quantities of such goods and materials have been shipped or sent from the building by express and mail to consignees and addressees in various states of the United States.

27. Salesmen, buyers, free-lance artists, advertising copy-writers, messengers, and customers, officers, agents and employees of tenants must make regular use of the building elevators in order to transact their business or to get to and from their work.

28. Most of the tenants have occupied less than a full floor but there are several which have leased space on more than one floor and in such cases employees and executives have frequently used the elevators to go from one department to another, carrying with them advertising and publicity copy, photographic materials and commercial art designs in course of preparation.

29. The Court takes judicial notice of the fact that the tenants could not successfully and efficiently carry on their [fol. 370] businesses in the 48-story building here involved

without the services and facilities provided by plaintiffs and similar employees. In that sense, the work of the building service employees is indispensable to the activities of the tenants.

30. The Court takes judicial notice also of the fact that a strike or stoppage of plaintiffs and other building service employees of defendant would seriously affect, interrupt, and interfere with important commercial activities of the various tenants in the building.

31. During the period in question defendant has failed and refused to pay overtime compensation to plaintiffs and other employees similarly situated at the rates provided for by Section 7 of the Fair Labor Standards Act.

32. Each of the plaintiffs and other employees similarly situated has been underpaid, if entitled to the benefits of the Act, in the amount opposite the name of each in Schedule A annexed to Plaintiffs' Exhibit 1.

32. During the period covered by the complaint the various employees named in Schedule A annexed to Plaintiffs' Exhibit 1 were employed by and were employees of the defendant within the meaning of the Fair Labor Standards Act.

33. Plaintiffs' attorney has performed, or will have performed, services reasonably worth the sum of \$7,500, including such services as may be necessary in connection with the conduct of any appeal or appeals which may be taken in the action.

[fol. 371]

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine the issues in this cause and to grant the relief prayed for in the complaint.

2. Plaintiffs and other building service employees similarly situated have been, during the period covered by the complaint, employees engaged in interstate commerce and employees engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

3. Defendant, during the period from October 24, 1938 and continuously through the period covered by the complaint, has violated the provisions of Section 7 of the Act.

4. Plaintiffs are entitled to recover the sum set opposite the name of each in Schedule A annexed to Plaintiffs' Exhibit 1, together with an additional equal amount as liquidated damages in each case, and average interest thereon, and plaintiffs are also entitled to a reasonable attorney's fee in the sum of \$7,500 and costs of the action.

5. Any employee similarly situated to plaintiffs who shall have executed and filed with the Clerk of this Court prior to judgment a duly executed written authorization to Charles Callus authorizing him to institute and maintain the action in behalf of such employee is entitled to recover the amount set forth opposite his name in Schedule A annexed to Plaintiffs' Exhibit 1, together with an additional equal amount as liquidated damages in each case and average interest thereon.

Dated, May —, 1943.

— — —, United States District Judge.

[fol. 372] IN UNITED STATES DISTRICT COURT

JUDGMENT

This action having been regularly brought to trial before the Court without a jury and having been tried on the 16th, 18th, 19th, 22nd, 23rd and 24th days of March, 1943, and the plaintiffs and the defendant 10 East 40th Street Building, Inc., having appeared by their attorneys and the cause of action against the defendant Cross and Brown Company having been severed and the Court having made and filed, on the 28th day of May, 1943, its opinion and decision, containing Findings of Fact and Conclusions of Law,

Now, on motion of Proskauer, Rose, Goetz & Mendelsohn, attorneys for the defendant 10 East 40th Street Building, Inc., it is hereby

Adjudged that the Complaint of the plaintiffs be and the same hereby is dismissed on the merits; and it is further

Adjudged that the defendant 10 East 40th Street Building Inc., shall recover no costs in this action.

Dated, New York, N. Y., June 3rd, 1943.

Approved: Hulbert, United States District Judge.

Judgment rendered this 4th day of June, 1943. George J. Follmer, Clerk.

[fol. 373] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given that plaintiffs in the above entitled action hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment and every part thereof entered in this action on June 4, 1943.

Victor J. Herwitz, Attorney for Plaintiffs, 521 Fifth Avenue, New York, N. Y.

[fol. 374] IN UNITED STATES DISTRICT COURT

STIPULATION CORRECTING FINDINGS

It is Hereby Stipulated by and between the attorneys for the respective parties in the above entitled action that the figures with respect to percentage of area occupied by different classes of tenants in number (6) of the findings of fact heretofore signed and entered by the Court in the action may be corrected to indicate that the respective percentages referred to are percentages "of the rentable area," rather than percentages "of the rented area" as originally appearing in the findings of fact as signed and entered.

It is Further Stipulated and Agreed that the substitution of the word "rentable" for the word "rented" in the respective subdivisions of finding number (6) shall not provide the basis for a reversal of the judgment below.

New York, November 27, 1943.

Victor J. Herwitz, Attorney for Plaintiffs. Proskauer, Rose, Goetz & Mendelsohn, Attorneys for Defendant, 10 East 40th Street Building, Inc.

[fol. 375]. IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER DISPENSING WITH PRINTING OF CERTAIN EXHIBITS IN THE RECORD ON APPEAL

It is Hereby Stipulated by and between the attorneys for the parties to the above entitled action that the following exhibits, offered in evidence by plaintiffs at the trial of the action, need not be reproduced in the record on appeal, but the originals may be exhibited and copies thereof may be handed up to the United States Circuit Court of Appeals for the Second Circuit on the argument of the appeal as though reproduced in the record on appeal in full:

Plaintiffs' Exhibit 3

Brochure (Forbes Lithograph Mfg. Co.)

Plaintiffs' Exhibit 5

Package Memoranda (25 sheets)
(Forbes Lithograph Mfg. Co.)

Plaintiffs' Exhibit 9

Photograph (Eastman Kodak Co.)

Plaintiffs' Exhibit 10

Pieture Scrap-book (Eastman Kodak Co.)

Plaintiffs' Exhibit 14

Radio Script (Carl Byoir & Associates)

Plaintiffs' Exhibit 17

Teletype Communication (A. M. Tenney Associates)

Plaintiffs' Exhibit 21

Advertising Copy (Willis S. Towne)

Plaintiffs' Exhibit 22

Handkerchief Design (Cherokee Spinning Mills)

[fol. 376] Plaintiffs' Exhibit 23

"Textile Research," March 1943
(Textile Research Institute)

Plaintiffs' Exhibit 25

Textile Design (Cluett Peabody & Co.)

Plaintiffs' Exhibit 26

"Your Investments," March 1943
(American Investors Union)

Plaintiffs' Exhibit 27

List of Publications (Standard Magazines, Inc.)

Plaintiffs' Exhibit 28

"Ragon Organon," September 1942
(Textile Economics Bureau)

Plaintiffs' Exhibit 29

Rayon Cloth Production Report
(Textile Economics Bureau)

and

It is Further Stipulated and Agreed by and between the attorneys for the parties to the above entitled action that the following exhibit, introduced by plaintiffs at the trial of the action, need not be reproduced in the record on appeal but the original thereof may be sent to the United States Circuit Court of Appeals for the Second Circuit in lieu of a copy thereof, or handed up on the argument of the appeal for inspection by the Court as though reproduced in the record on appeal in full:

Plaintiffs' Exhibit 12

Scrap-book (Carl Byoir & Associates);

and

It is Further Stipulated and Agreed by and between the attorneys for the parties to the above entitled action [fol. 377] that the original of Plaintiffs' Exhibit 12 be entrusted to the attorney for plaintiffs for exhibition to the United States Circuit Court of Appeals for the Second Circuit, subject to its further order in regard thereto.

Dated, New York, N. Y., December 23, 1943.

Victor J. Herwitz, Attorney for Plaintiffs-Appellants.
Proskauer, Rose, Goetz & Mendelsohn,
Attorneys for Defendant-Respondent.

Filed December 27, 1943.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CONTENTS OF RECORD

The parties hereto, by their respective attorneys, stipulate and agree that the record on appeal of the plaintiffs from the judgment of this Court rendered the 4th day of June, 1943, shall be constituted of portions of the record, proceedings and evidence in the case as set out herein below, such portions of the record, proceedings and evidence being designated as the record on appeal:

- 1) Statement under Rule 13, subdivision 4.
- 2) Summons and complaint.
- 3) Answers.
- 4) Stipulation severing as to defendant Cross & Brown Company and marking off the calendar.
- 5) Stenographer's minutes of trial before Honorable Murray Hulbert, United States District Judge, March 16, 18, 19 and 22, 1943.

[fol. 378]

- 6) Plaintiffs' Exhibits 1, 3, 5, 9, 10, 12, 14, 17, 21, 22, 23, 25, 26, 27, 28 and 29.
- 7) Stipulation of the attorneys for the parties that Plaintiffs' Exhibits 3, 5, 9, 10, 14, 17, 21, 22, 23, 25, 26, 27, 28 and 29 be omitted from the printed transcript of the record on appeal, but that copies thereof may be handed up to the Circuit Court of Appeals; and further stipulating that Plaintiffs' Exhibit 12 need not be reproduced in the printed transcript of record on appeal but that the original thereof may be sent to the Circuit Court of Appeals in lieu of copies, or handed up upon the argument of the appeal for inspection by the Court.
- 8) Opinion, incorporating findings of fact and conclusions of law, of Hon. Murray Hulbert filed May 28, 1943.
- 9) Plaintiffs' proposed findings of fact and conclusions of law.
- 10) Judgment rendered June 4, 1943.
- 11) Plaintiffs' notice of appeal filed September 1, 1943.

12) Stipulation of attorneys for the parties, dated November 27, 1943, correcting finding of fact numbered 6.

13) Designation of portions of record to be contained in the record on appeal—this stipulation

Dated, New York, N. Y., April 3, 1944.

Aaron Benenson, Attorney for Plaintiffs-Appellants. Proskauer, Rose, Goetz & Mendelsohn, Attorneys for Defendant-Respondent.

[fol. 379] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action, as agreed upon by the parties.

Dated, New York, September 22, 1944.

Victor J. Herwitz, Attorney for Plaintiffs-Appellants. Proskauer, Rose, Goetz & Mendelsohn, Attorneys for Defendants-Appellees.

[fol. 380] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 381] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 143

(Argued November 13, 1944. Decided December 12, 1944)

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED
BREGLIA, Joseph Barbara, Gerald Kerr, Peter Ohan,
Angelo Micallef, Frank Voscinar, William De Troy, John
Michalicka, Isadore Mika, Jacob Vartabedian, Laurence
Zammit, Julius Orosz, Charles Bonnici, Benjamin C.
Harris, Dennis Shea, Alfonso Chivelly, Thomas Calla-
han, Frank Lange, Frank Colangelo, Salvatore Fiorenza,
Joseph Spiteri, Wally Spiteri, Aziz Kassabian, Albert
Vogel, Paul Chambers, Samuel Mitchell, Peter Macrédi,
Elia Vecchione, Michael Addea, Michael De Troy, Joseph
S. Rayzak, Herbert B. McClelland, Thomas Rosso, Gae-
tano Greck, John I. Ortiz, Gilbert Ortiz, Pasquale A.
Saggese, Edward Killian, James H. Law, George Orosz,
Salvador Sanchez, Robert Murden, John P. Smyth, Fred
Kassab, Joseph Cefai, Joseph Herrera, Emil J. Cisek
and Charles G. Borg, suing in behalf of themselves and
all other employees and former employees of defendants
similarly situated, Plaintiffs-Appellants,

v.

10 EAST 40TH STREET BUILDING, INC., and CROSS & BROWN
COMPANY, Defendants-Appellees

[fol. 382] Before: L. Hand, A. N. Hand and Frank, Circuit
Judges

Appeal from a judgment of the United States District Court
for the Southern District of New York dismissing appel-
lants' complaint. Reversed.

AARON BENENSON (Monroe Goldwater and James L.
Goldwater, of counsel) for appellants;

PROSKAUER ROSE GOETZ & MENDELSON (Joseph M.
Proskauer, Harold H. Levin, of counsel) for appellee,
10 East 40th Street Building, Inc.

This is an action under § 16(b) of the Fair Labor Stand-
ards Act (28 U. S. C. § 216(b)) for the recovery by the

plaintiffs, employees of defendant, of overtime wages and an equal amount in liquidated damages. The only question presented is whether the employees are covered by the Act. The plaintiffs are maintenance employees of an office building which is owned and operated by the defendant corporation. The building, during the time in question, was rented to the following groups of tenants:

(1) Executive and sales offices of twenty concerns carrying on elsewhere the business of manufacturing and mining. The offices are used for executive and administrative activities, for conferences and for taking orders for substantial quantities of merchandise of considerable value manufactured and shipped, from factories and mines elsewhere located, to customers in several states.

[fol. 383] (2) Offices of sales agencies representing seventeen manufacturers and mining concerns carrying on elsewhere the business of manufacturing and mining. The offices in the building are used to sell a variety of the products of the companies they represent. As a result of the efforts of these agencies substantial amounts of merchandise of considerable value are shipped across state lines from factories, mines, and warehouses, elsewhere located in various parts of the country.

(3) Twenty-four lawyers and law firms carrying on the usual activities incident to the practice of law.

(4) The United States Employment Service which places white-collar workers in various factories and business houses.

(5) Advertising agents and publicity and trade organizations which carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm. The officers and employees of the trade organization are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

(6) Engineering and construction firms which carry on their correspondence and executive and administrative activities from the offices in this building.

(7) Investment, financing and credit organizations which use their offices for their executive and administrative work. [fol. 384] The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

(8) Offices of import and export firms which make arrangements for export and import of a variety of goods of substantial value.

(9) Miscellaneous tenants including dentists, charitable organizations, etc., whose activities are not interstate in character.

FRANK, Circuit Judge:

The plaintiffs' suit is based on the theory that they are "engaged in the production of goods for [interstate] commerce." They do not, and could not, contend that they are "engaged in [interstate] commerce." *McLeod v. Threlkeld*, 319 U. S. 491. It is already well-established that, where the tenants of a building are engaged in manufacturing, the service employees of the building come under the Fair Labor Standards Act, 29 U. S. C. sections 201 et seq. *Kirschbaum Co. v. Walling*, 316 U. S. 517. And we have recognized that persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the Act as to bring the service employees of the office building in which they are located under the coverage of the Act. *Borella v. Borden*, 145 F. (2d) — (C. C. A. 2). The question before us here then is whether a substantial proportion of the tenants of the office building at 10 East 40th Street are engaged in the production of goods for commerce.

1. It is clear, we think, that the investment, finance and credit organizations, the engineering and construction firms, [fol. 385] as well as the lawyers, the United States Employment Service and the miscellaneous tenants described above are not engaged in the production of goods for commerce. These tenants occupy about 44% of the available space and 49% of the rented part of the building.

2. It would seem equally clear that the executive offices of the manufacturing and mining concerns are occupied by those engaged in the production of goods for commerce, *Borella v. Borden, supra*. These tenants occupy about 26% of the rentable area of the building and about 29% of the rented space. Thus, it may not be necessary to go beyond the activities of these tenants to determine that the maintenance employees are entitled to the benefits of the Act. The Wage and Hour Division has adopted a standard of 20% for determining whether a substantial portion of the building is devoted to production for interstate commerce. Release No. PR-19 (rev.) (Nov. 19, 1943). Some quantitative standard is necessary. Interpretations of the Act by the Wage and Hour Division, especially when not taking the form of authorized regulations, are not decisive; but we have been admonished that they are "entitled to great weight." *United States v. American Trucking Associations*, 310 U. S. 534, 549. The Division's 20% standard seems to us a sensible one for the courts to adopt.

3. The publicity concerns which design a substantial part of the advertising material, lithographed and printed matter, etc., which are shipped in interstate commerce come within the definition of the Act. These firms occupy about 6.5% of the rentable area and about 7.5% of the rented area of the building. This, added to the space occupied by the management groups yields totals of 32.5% and 36.5% respectively.

[fol. 386] 4. For the purpose of the statute, the sales agencies representing mining and manufacturing concerns are engaged in the production of goods for commerce. The Act covers "goods" until "their delivery into the actual physical possession of the ultimate consumer." Section 3(i) [29 U. S. C. A. § 203(i)]. And "production" is defined to include "handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." Section 3(j). [29 U. S. C. A. § 203(j)]. Thus, transportation of goods until their delivery to the ultimate consumer is "production" as defined by the statute. A sales agent who procures the contracts in performance of which the goods are "transported" is therefore engaged in the production of goods for commerce, since he is "necessary" to the "transporting." It may be contended that such a construction would

bring all retailers within the Act and that Congress had no such intention. § 13(a)(2) of the Act [29 U. S. C. A. § 213(a)(2)], however, specifically excludes employees "engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." This would indicate that where the "selling or servicing is in [interstate] commerce" the employees are to be included in the scope of the Act.

Moreover, sales agents may be considered as engaged in "handling" the goods by arranging their transfer from one person to another. That no physical contact with the goods is necessary we pointed out in the *Borella* case. Cf. *Kirschbaum Co. v. Walling*, *supra*. And § 13(a)(5) [29 U. S. C. A. § 213(a)(5)] specifically excludes employees engaged in "marketing" and "distributing" of certain designated products. By implication, marketing and distributing of other products would seem to be included within the Act.

Furthermore, the activity of the sales agents is economically necessary to the production of goods. As Mr. Justice Jackson recently pointed out, the word "necessary" in the [fol. 387] statute is not to be construed so rigidly as to include within the Act only those essential to the actual manufacture of the goods. *Armour and Co. v. Wantock*, — U. S. — (December 4, 1944).

These sales agencies represent occupancy of about 9.5% of the available area and 10.5% of the rented area. Adding the space they occupy to that occupied by executive offices and publicity concerns yields the result that the portion of the building occupied by firms engaged in the production of goods for interstate commerce is 42% of the rentable area and 48% of the rented area.

Decisions of other Circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here.

Reversed.

[fol. 388] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

CHARLES CALLUS, et al., Plaintiffs-Appellants,

v.

10 EAST 40TH STREET BUILDING, INC., and CROSS & BROWN
COMPANY, Defendants-Appellees

Before L. Hand, Augustus N. Hand and Frank, C. JJ.

The opinion is modified by changing the first two sentences to read: "The plaintiffs' suit is based primarily on the theory that they are 'engaged in the production of goods for [interstate] commerce.' They cannot effectively contend that they are 'engaged in [interstate] commerce.' McLeod v. Threlkeld, 319 U. S. 491."

L. Hand, U. S. C. J.; Augustus N. Hand, U. S. C. J.;
Jerome N. Frank, U. S. C. J.

December 21, 1944.

[fol. 389] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December, one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Augustus N. Hand,
Hon. Jerome N. Frank, Circuit Judges.

CHARLES CALLUS, et al., Plaintiffs-Appellants,


v.

10 EAST 40TH STREET BUILDING, INC., & CROSS & BROWN
COMPANY, Defendants-Appellees

Appeal from the District Court of the United States for
the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration. Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree. 

Alexander M. Bell, Clerk.

[fol. 390] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Charles Callus, et al., v. 10 East 40th St. Bldg., Inc., & Ano. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed December 27, 1944. Alexander M. Bell, Clerk.

[fol. 391] Clerk's Certificate to foregoing transcript omitted in printing.

(5916)

[fol. 392] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 12, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 688, *Borden Co. v. Borella, et al.*, which is also transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Joseph M. Proskauer. File No. 49,273. U. S. Circuit Court of Appeals, Second Circuit. Term No. 820. 10 East 40th Street Building, Inc., Petitioner, vs. Charles Callus, Samuel Said, Louis Saggese, et al. Petition for a writ of certiorari and exhibit thereto. Filed January 6, 1945. Term No. 820 O. T. 1944.

(6748)

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

Supreme Court, U. S.
JAN 6 1945
CHARLES ELMORE DROPLEY
CLERK

10 EAST 40th STREET BUILDING, INC.,

Petitioner,

—against—

CHARLES CALLUS, SAMUEL SAHD, LOUIS SAGGESE, ALFRED
BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, AN-
GELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN
MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE
ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HAR-
RIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN,
FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JO-
SEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VO-
GEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI,
ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH
S. RAYZAK, HERBERT B. McCLELLAND, THOMAS ROSSO, GAETANO
GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE,
EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR
SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB,
JOSEPH CEFAL, JOSEPH HERRERA, EMIL J. CISEK, and CHARLES
G. BORG, suing in behalf of themselves and all other employees and
former employees of defendants similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1944

No.

10 EAST 40th STREET BUILDING, INC.,

Petitioner,

—against—

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. McCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAL, JOSEPH HERRERA, EMIL J. CISEK, and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

Your petitioner, 10 East 40th Street Building, Inc., respectfully shows:

Summary Statement of the Matter Involved.

Petitioner prays for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which held that respondents, elevator operators, porters, watchmen and other maintenance employees (R. 1049, 1050) employed by the petitioner in its office building at 10 East 40th Street, in the City of New York, were engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 [29 U. S. C. §207(a)] and, therefore, were entitled to overtime compensation, liquidated damages and counsel fees under said Act.

Said decision was made in reversing a judgment of the United States District Court for the Southern District of New York, which dismissed respondents' complaint on the merits (R. 1114-16). In their complaint respondents claimed that they were covered by said Act by reason of their engagement in commerce and in production of goods for commerce, as defined by said Act.

The Circuit Court opinion expressly states:

"Decisions of other circuits which reached a contrary view^o seem to have rejected the rationale to which we committed ourselves in the *Borella** case and to which we shall adhere here."

There is thus a frank avowal that the decision herein conflicts with decisions in other circuits.

The opinion rejects respondents' contention that these building employees were engaged in interstate commerce. It is based on the holding that they were engaged in the production of goods for commerce.

* *Borella v. Borden*, 145 Fed. 2nd —, certiorari granted — U. S. — January 2, 1945.

This ultimate holding is, in turn, based on the holding that because more than 20% of the building was occupied by sales and executive offices of manufacturing and mining concerns, elsewhere engaged in manufacture and mining, these tenants were there engaged in the production of goods for commerce and therefore the elevator men and other service employees who served them were likewise engaged in the production of goods for commerce.

Indeed, it is of the essence of the opinion, in order to arrive at the 20% degree of occupancy which is used as a criterion, to hold that sales offices and sales agencies are producers of goods for commerce, even though not a shred of work making toward actual production is done on the premises.

Opinions Below.

The Circuit Court of Appeals wrote an opinion which has not yet been reported. The opinion of District Judge Murray Hulbert is reported in 51 F. Supp. 528.

Facts.

The facts are not in dispute. Petitioner, a New York corporation, owns a multi-tenanted forty-eight story and basement office building at 10 East 40th Street in New York City. Its business consists of the management and operation of and rental of space in said building (R. 1068). Petitioner employed respondents as maintenance workers in said building.

The building may be fairly described as a typical metropolitan office building.

During the period covered by the complaint, there were in all 111 tenants who occupied 89% of the rentable area of the building (R. 1069-70).

The Circuit Court of Appeals summarized the occupancy of the building, as follows:

"(1) Executive and sales offices of twenty concerns carrying on elsewhere the business of manufacturing and mining. The offices are used for executive and administrative activities, for conferences and for taking orders for substantial quantities of merchandise of considerable value manufactured and shipped, from factories and mines elsewhere located, to customers in several states.

(There is no evidence whatever separating the amount of space occupied for executive or for sales office purposes, as hereinafter pointed out.)

(2) Offices of sales agencies representing seventeen manufacturers and mining concerns carrying on elsewhere the business of manufacturing and mining. The offices in the building are used to sell a variety of the products of the company they represent. As a result of the efforts of these agencies substantial amounts of merchandise of considerable value are shipped across state lines from factories, mines, and warehouses, elsewhere located in various parts of the country.

(3) Twenty-four lawyers and law firms carrying on the usual activities incident to the practice of law.

(4) The United States Employment Service which places white-collar workers in various factories and business houses.

(5) Advertising agents and publicity and trade organizations which carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm. The officers and employees of the trade organization are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

(6) Engineering and construction firms which carry on their correspondence and executive and administrative activities from the offices in this building.

(7) Investment, financing and credit organizations which use their offices for their executive and administrative work. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

(8) Offices of import and export firms which make arrangements for export and import of a variety of goods of substantial value.

(9) Miscellaneous tenants including dentists, charitable organizations, etc., whose activities are not interstate in character."

It is undisputed, and the trial court found, that there was "no manufacturing of any kind carried on in the office building" (R. 1048). The Trial Court also made, and the

Circuit Court of Appeals did not reverse, the finding that the amount of space utilized in the building

"in connection with the publicity and advertising prepared in or outside of the building * * * in relation to the entire volume of business transacted and carried on by the tenants at and from said premises is not substantial" (R. 1048).

Rejecting respondents' contention that they were covered by the Act because they were "engaged in commerce", the Circuit Court held that respondents were, nevertheless, engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. In doing so, the Court considered the space occupied by said groups of tenancies, holding:

1. "That the investment, finance and credit organizations, the engineering and construction firms, as well as the lawyers, the United States Employment Service and the miscellaneous tenants described above are not engaged in the production of goods for commerce. These tenants occupy about 41% of the available space and 49% of the rented part of the building."

2. That the executive and sales offices of manufacturing and mining concerns in class (1) which occupy 26% of the rentable area and 29% of the rented space in the building were engaged in production;—this based upon the holding in *Borella v. Borden*, 145 F. 2d — CCA 2, cert. granted — U. S. — January 2, 1945.

3. That the publicity concerns occupying 6.5% of the rentable area and 7.5% of the rented area were likewise engaged in production.

4. That sales agencies representing mining and manufacturing concerns, which occupy 9.5% of the available area and 10.5% of the rented area, were engaged in production because the contracts procured by them caused goods to be transported and they were thus "necessary" to the "transporting". Said court also held that sales agents "may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another".

The Circuit Court of Appeals adopted the 20% test of substantiality set by the Wage and Hour Administrator and thus found that the building was substantially devoted to production of goods for commerce.

In making its decision, the 2nd Circuit Court of Appeals stated that other Circuits

"which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here."

It should be pointed out, however, that the decision herein represents an extension of the holding in *Borella v. Borden*, 145 F. 2d —, 7 WHR 804 (certiorari granted — U. S. — January 2, 1945). In the *Borella* case, The Borden Company, owner of the office building and employer of the plaintiffs in that case, was engaged in manufacturing milk products and itself occupied 58% of the rentable area of its building. In such space were housed the officers and employees of The Borden Company who, as stated in the opinion of the Circuit Court of Appeals, supervised, managed and controlled its entire manufacturing business. This fact, the Circuit Court held, brought the plaintiffs in that case

"nearer to 'production' than were the employees in *A. B. Kirschbaum v. Walling*, Administrator, supra (316 U. S.

517) * * * " *Borella v. Borden*, 145 F. 2d —, 7 WHR 804 (C. C. A. 2d), cert. granted January 2, 1945.

In the case at bar, the defendant office building owner is not engaged in production of goods in the building or elsewhere and there is no finding that the tenants direct production activities of their factories and mines from the building herein.

In fact, the undisputed evidence is that some of the manufacturing and mining company tenants maintain offices in New York purely as a convenience (R. 344-45; 347; 820) and a number of the larger manufacturing companies, such as General Motors Corporation (R. 212), Tennessee Eastman Corporation (R. 219), Chase Brass & Copper Co. (R. 708) and Thomas A. Edison, Inc. (R. 379) use their offices solely for sales purposes.

To sustain its decision under said 20% test of substantiality, it was, therefore, necessary for the Circuit Court to hold, as it did, that selling constitutes production of goods for commerce. Said the Court:

"Thus, transportation of goods until their delivery to the ultimate consumer is 'production' as defined by the statute. A sales agent who procures the contracts of performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting'."

Application has not been made for reargument, reconsideration or rehearing in respect to the decision of the Circuit Court of Appeals for the Second Circuit. Its order for a mandate was entered on December 27, 1944 and its mandate has been stayed and withheld pursuant to order to show cause signed by Judge Augustus N. Hand of said

Court dated December 21, 1944, until the hearing and determination of petitioner's application for a thirty day stay pending this application by your petitioner for a writ of certiorari to said Court.

Jurisdictional Statement.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Questions Presented.

On the basis of the foregoing, petitioner desires this Court to review the following questions:

1. Whether the administrative and selling activities conducted by manufacturing and mining company tenants in the office building herein were "necessary" to and thus constituted "production of goods for commerce" within the meaning of the Fair Labor Standards Act because such companies were elsewhere engaged in manufacturing and mining.
2. Whether sales agencies and their salesmen and office workers, housed in petitioner's office building, were engaged therein in activities "necessary" to and were thus engaged in the "production of goods for commerce" within the meaning of said Act, because the contracts procured by said agencies or sales representatives brought about the transportation of goods in commerce.

Assuming questions "1" and "2" are answered in the affirmative,

3. Whether those, whose work is necessary to the activities of others whose activities in turn are necessary to the activities of still others elsewhere engaged in the actual production of goods, are themselves engaged in the "production of goods for commerce" within the meaning of said Act.

4. Whether the work of the maintenance employees of petitioner's office building had a sufficiently close tie with the administrative, sales, publicity and advertising activities of the tenants and their employees so as to make such maintenance work "necessary" to such tenants' activities within the meaning of said Act.

5. Whether the 20% test of substantiality adopted by the Wage and Hour Administrator on November 19th, 1943 and adopted by the Circuit Court in this case represents a proper test in these building maintenance workers cases.

Reasons Relied on for Granting the Writ.

This Court is requested to grant the Writ for the following reasons:

1. On January 2nd, 1945, this court granted the application for a writ of certiorari in *Borella v. Borden, supra*. The Circuit Court of Appeals based its determination herein upon its holding in the *Borella* case, and thereby extended the holding of that case so as to make it applicable to all multi-tenanted office buildings which house sales offices of manufacturing companies, or their representatives.

2. The decision of the Circuit Court of Appeals herein is in conflict with more than a score of decisions of State and Federal Courts (including six Circuit Courts) which have uniformly held that maintenance employees of office buildings are not covered by the Act. To mention only those

left undisturbed by this Court upon application for certiorari:

Johnson, et al. v. Dallas Downtown Development Co., 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790;

Stoike v. First National Bank of New York, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11th, 1943;

Tate v. Empire Building Corp., 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11th, 1943;

Johnson v. Masonic Building Co., D. C. Ga., 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28th, 1944;

Rucker, et al. v. First National Bank of Miami, Okla., 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31st, 1944;

Rosenberg (Lorenzetti) v. Semaria, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18th, 1943;

Convey v. Omaha Nat. Bank, 140 F. 2d 640, CCA 8th, cert. den. 321 U. S. 781, March 6th, 1944.

In the opinions in three of said cases, the Circuit Courts specifically considered and rejected the contention that maintenance workers of office buildings are engaged in the production of goods for commerce.

Rucker v. First National Bank of Miami, Okla.;

Johnson v. Dallas Downtown Development Co.;

Johnson v. Masonic Building Co., *supra*.

3. The holding of the Circuit Court of Appeals herein that respondents are "necessary" (within the meaning of said Act) to the activities of tenants, elsewhere engaged in producing goods, or to sales representatives who procure

contracts causing goods to be transported from factories and mines elsewhere located, is in direct conflict with the decisions in the following cases:

Johnson v. Masonic Building Co., 138 F. 2d 817 (CCA 5th) cert. den. 321 U. S. 780;

Rucker v. First National Bank of Miami, Okla., 138 F. 2d 699 (CCA 10th) cert. den. 321 U. S. 769;

Johnson v. Dallas Downtown Dev. Co., 132 F. 2d 287 (CCA 5th) cert. den. 318 U. S. 790;

Blumenthal v. Girard Trust Co., 141 F. 2d 849 (CCA 3rd).

4. The holding of the Circuit Court of Appeals herein that the maintenance workers herein were engaged in "production" because their work was "necessary" to the activities of those who prepared advertising copy is in conflict with the holding in *Walling v. Goldblatt Bros.*, 128 F. 2d 778 (CCA 7th) cert. den. 318 U. S. 757.

5. The decision herein should be reviewed because of the importance of the questions involved. Numerous actions involving office building maintenance workers were instituted before the legal issues herein were presumably disposed of by this Court's refusal of *certiorari* in office building cases all of which were decided in favor of the defendants.

As a result of the decision of the Circuit Court of Appeals, 2nd Circuit, in this case—and, to a lesser extent, in *Borella v. Borden*, *supra*,—there has been and undoubtedly there will be a revival of actions already instituted, numerous appeals will be taken, and new actions will be brought against multi-tenanted office building owners which house offices of tenants elsewhere engaged in the production of goods for commerce or salesmen or sales representatives of firms elsewhere engaged in manufacturing or mining.

This is a serious threat to such office building owners who will be faced with a liability retroactive to October 24th, 1938, not only for unpaid overtime wages, but for an equal amount in liquidated damages and for counsel fees, despite their reliance upon what appeared to be a well settled interpretation of the provisions of the Fair Labor Standards Act.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y.,
January 3, 1945.

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Supreme Court of the United States

OCTOBER TERM, 1944

No.

10 EAST 40th STREET BUILDING, INC.,

Petitioner,

—against—

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. McCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAL, JOSEPH HERRERA, EMIL J. CISEK, and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

• *Opinions of Courts Below.*

The opinion of the District Court is reported in 51 F. Supp. 528 (R. 1033-1066).

The opinion of the 2nd Circuit Court of Appeals is not yet reported.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code,

Section 240, as amended (Act of March 3rd, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3rd, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13th, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Statement of Case.

A sufficient statement of the case will be found in the accompanying petition and in the interest of brevity will not be repeated.

Relevant Provisions of Statute Involved.

Fair Labor Standards Act of 1938—(Act of June 25th, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 2a 219).

"Sec. 3. As used in this Act—

.

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." [29 U. S. C. §203(b)]

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." [29 U. S. C. §203(j)]

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees

who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." [29 U. S. C. §207(a)]

Sec. 16(b)

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." [29 U. S. C. §2166]

Specification of Errors.

The Circuit Court of Appeals erred as follows:

1. In holding that administrative and sales employees in offices in New York City were there engaged, in the "production of goods for commerce" as defined by the Fair Labor Standards Act, because their employers were engaged in manufacturing or mining in distant places.

2. In holding that the employees of sales agencies for manufacturing and mining companies were engaged at their offices in the production of goods for commerce within the meaning of said Act because as a result of contracts effected by such agencies goods are transported from factories and mines elsewhere located.

3. In holding that the work of maintenance workers of this office building had a sufficiently close tie with the activities of the tenants' administrative employees, sales agents, advertising and publicity workers as to make such maintenance work "necessary" to "production" within the meaning of said Act.

4. In holding that those whose work was held "necessary" for the comfort and convenience of others, whose activities in turn were necessary to the activities of still others engaged—in distant places—in the actual production of goods, were themselves engaged in the "production of goods for commerce" within the meaning of said Act.

ARGUMENT

POINT I.

• The decision for which review is sought represents an extension of the holding in *Borella v. Borden*, 145 Fed. 2d — (cert. granted January 2, 1945, and is avowedly in conflict with the decisions of six other Circuit Courts and numerous other courts.

The *Borella* case and this case are the only reported cases in which office building workers have been held to be covered by said Act.

In every one of the following actions, brought by maintenance employees of multi-tenanted office buildings, judgment has been rendered in favor of the defendant. In every one of the seven cases in which application for certiorari was made to this court, certiorari was denied.

Johnson, et al. v. Dallas Downtown Development Co., 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790;

Stoike v. First National Bank of New York, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11th, 1943;

Tate v. Empire Building Corp., 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11th, 1943;

Johnson v. Masonic Building Co., 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28th, 1944;

Rucker, et al. v. First National Bank of Miami, Okla., 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31st, 1944;

Rosenberg (Lorenzetti) v. Semaria, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18th, 1943;

- Convey v. Omaha Nat. Bank*, 140 F. 2d 640, CCA 8th, cert. den. 321 U. S. 781, March 6th, 1944;
- Lofther v. First National Bank of Chicago*, 48 F. Supp. 692, aff'd CCA 7th, 138 F. 2d 299;
- Patterson, et al. v. Memphis Cotton Exchange Realty Co., Inc.*, Tenn. Chancery Court, 6 WHR 308;
- Brandell, et al. v. Continental Illinois National Bank Co.*, 43 F. Supp. 781;
- Cochran v. Florida National Building Corp.*, 45 F. Supp. 830, aff'd CCA 5th, 134 F. 2d 615;
- Building Service Employees Union, Local 238 v. Trenton Trust Co.*, 53 F. Supp. 129, aff'd CCA 3rd, 142 F. 2d 257;
- Baum v. M. C. Office Building Co.*, Kansas Sup. Ct., 6 WHR 1236, November 6th, 1943;
- Hinkle v. Frank Nelson Bldg.*, 7 WHR 689, Alabama Supreme Court;
- Hinkler v. 83 Maiden Lane Corporation*, D. C. N. Y., 50 F. Supp. 263;
- Wideman v. Blanchard & Calhoun Realty Co.*, D. C. Ga. 50 F. Supp. 626;
- Matter of Liquidation of N. Y. Title & Mort. Co.*, 179 Misc. 789;
- Johnson v. Great Nat. Life. Ins. Co.*, Tex. Civ. App., 166 S. W. 2d 935;
- Johnson v. Filstow*, 43 F. Supp. 930, D. C. Fla.;
- Belies v. Penn Bldg., Inc.*, Appellate Term, 1st Dept., 180 Misc. 1062, aff'd 267 App. Div. 955;
- Cullen v. Stone & Webster Building, Inc.*, 7 WHR 147, D. C. N. Y., December 24th, 1943;
- Blumenthal v. Girard Trust Co.*, 141 F. 2d 849, CCA 3rd;
- Baldwin v. Emigrant Ind. Sav. Bank*, D. C. N. Y., 7 WHR 831.

Lest it be claimed that these cases did not consider engagement in "production" as distinguished from engagement "in commerce", it should be noted that in *Johnson, et al. v. Dallas Downtown Development Co.*, 132 F. 2d 287 (CCA 5th) cert. den. 318 U. S. 790, in *Rucker v. First National Bank of Miami*, 138 F. 2d 699 (CCA 10th) cert. den. 321 U. S. 769 and in *Johnson v. Musonic Building* (CCA 5th), 138 F. 2d 817, cert. den. 321 U. S. 780, the Circuit Courts specifically considered and rejected the claim that maintenance employees in those office building cases were engaged in the production of goods for commerce. These cases will be discussed in detail under Point II, *infra*.

POINT II.

The decision herein is avowedly in conflict with the decisions of other Circuit Courts of Appeals which have refused to hold that maintenance employees of office buildings are engaged in production because tenants are elsewhere engaged in production.

The determination of the Circuit Court of Appeals herein is an extension of its holding in *Borella v. Borden*, 145 F. 2d —, 7 WHR 804 (CCA 2; cert. granted January 2, 1945).

Said court recognized the conflict between its decisions in this and the *Borella v. Borden* cases and the decisions in other Circuits when it said:

"Decisions of other Circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here."

The other Circuits in deciding the questions here under discussion applied the definitions provided by this Court in *Kirschbaum v. Walling*, 316 U. S. 517, which dealt with claims of maintenance workers of loft buildings "principally devoted" to manufacturing.

In the *Kirschbaum* case Mr. Justice Frankfurter indicated that work "necessary" to production as used in the statute means work having "a close and immediate tie with the process of production" and he stated further that where the work of an employee "has only the most tenuous relation to" the production of goods, such work is not to be considered "necessary" (p. 525 of 316 U. S.).

Similar definitions were employed in *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, *Walton v. Southern Package Corp.*, 320 U. S. 540 and in *Armour & Co. v. Wantock*, — U. S. —, decided December 4th, 1944. In these cases, those who dug wells were held engaged in the production of oil and watchmen and firemen employed to protect goods in the process of production were held to have a sufficiently close and direct relationship with actual production to make them "necessary" to such production.

We do not contend for any such definition of the word "necessary" as was urged upon this court in *Armour v. Wantock*, *supra*, but we do earnestly urge that in the use of the "practical judgment" referred to in the opinions in the *Armour* and *Kirschbaum* cases it is impossible to reach the conclusion that these elevator men and floor cleaners were engaged in the production of goods for commerce. They had no "close and immediate tie with" production.

Under these definitions, those who are necessary to others who, in turn, are necessary to still others who are engaged in actual production are not themselves engaged in production. Those who are twice removed from production would not have a "close and immediate tie with" production.

If these definitions are to be discarded—as they were by the Circuit Court in this and the *Borella* cases—there would be no end to the chain of producers. If elevator operators are producers of goods because they are necessary to admin-

istrative employees, salesmen, stenographers and accountants who, in turn, are necessary to manufacturing activities in another state, then the bus drivers who bring the elevator man to work, the tailor who cleans the bus driver's uniform and the gasoline station attendant who fills the bus' tank are likewise in a "remote" sense "necessary" to production in distant places.

Other circuit courts have met this problem of "drawing lines" by following the directions and definitions of this court laid down in the *Kirschbaum* case.

Thus, in *Johnson v. Masonic Bldg. Co.*, 138 F. 2d 74, cert. den. 321 U. S. 780, there were a number of tenants who produced goods outside of their offices in the building involved in that case. Referring to such occupancy, the 5th Circuit Court said:

"The building employees are not doing anything that is necessary to or even directly contributes to such production. The case is not like *Kirschbaum v. Walling*, 316 U. S. 517 [5 WHR 442], where the building was devoted to the production of such goods. If the office men of Merry Bros. Brick and Tile Company and Southeastern Bituminous Company can be said to be producers of goods, the appellants, employed by another employer with no especial reference to the business of any tenant, cannot be held to be so engaged because these tenants were producing goods elsewhere."

In *Rucker v. First National Bank of Miami*, 138 F. 2d 699 CCA 10th, cert. den. 321 U. S. 769, the Court found that the building therein was occupied by executive and administrative offices of a mining and smelting company, the executive offices of a railroad company, the office of the company engaged in selling chat and crushed rock, an abstract company, the sales office of an extension university, sales office of DuPont Company, brokers, etc.

Referring to this type of occupancy, the Court said:

"Specifically, we are urged to hold that these employees, as elevator operators, were engaged in the production of goods for commerce on the authority of *Kirschbaum Co. v. Walling, supra.*"

* * * * *

"But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the *Kirschbaum* case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. *In any event, the relationship is not shown to be 'close and immediate'.* Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce" (at p. 702). (Italics ours.)

POINT III.

The holding that sales representatives are producers of goods conflicts with the reasoning and determinations of this and other courts in related cases.

In order for the Circuit Court of Appeals to find substantial production in the building herein, it was necessary to

hold that the work of sales offices and sales agencies constitutes production. On this subject, the Circuit Court said:

"For the purpose of the statute, the sales agencies representing mining and manufacturing concerns are engaged in the production of goods for commerce. The Act covers 'goods' until 'their delivery into the actual physical possession of the ultimate consumer.' Section 3(i) [29 U. S. C. A. §203(i)]. And 'production' is defined to include 'handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof.' Section 3(j) [29 U. S. C. A. §203(j)]. Thus, transportation of goods until their delivery to the ultimate consumer is 'production' as defined by the statute. A sales agent who procures the contracts in performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting'. It may be contended that such a construction would bring all retailers within the Act and that Congress had no such intention. §13(a)(2) of the Act [29 U. S. C. A. §213(a)(2)], however, specifically excludes employees engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce. This would indicate that where the 'selling or servicing is in [interstate] commerce' the employees are to be included in the scope of the Act.

Moreover, sales agents may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another. * * * And §13(a)(5) [29 U. S. C. A. §213(a)(5)] specifically excludes employees engaged in 'marketing' and 'distributing' of certain designated products. By implication, marketing and dis-

tributing of other products would seem to be included within the Act."

A. The above quotation makes it clear that the Court below failed to distinguish between engagement in commerce and engagement in production of goods for commerce. There can be no question that those who transport and those who distribute goods in interstate commerce are "included within the Act", but they are included because they are "engaged in commerce", within the meaning of the Act, and not because they are engaged in "production of goods for commerce" or in an occupation necessary thereto.

B. The construction of the Court below also raises the question as to what Congress meant by an "occupation necessary to the production thereof".

From what this Court said in *Kirschbaum v. Walling*, *supra*, and later cases, it would seem to mean necessary to actual production of goods in the usual and accepted sense.

C. If "transportation of goods until their delivery to the ultimate consumer" is "production", then all warehouse and other employees of wholesalers would be covered by the Act. There would, then, be no basis for distinction, such as was made by this Court, between warehouse employees of wholesalers handling goods whose interstate journey had not come to an end and those working with goods to be sold and delivered to retailers intrastate.

Walling v. Jacksonville Paper Co., 317 U. S. 564;
Higgins v. Carr Bros. Co., 317 U. S. 572.

D. Furthermore, railroads are engaged in transportation. Maintenance of way employees are much closer to such transportation and much more "necessary" thereto than are sales

agents. And yet, in *McLeod v. Threlkeld*, 319 U. S. 491, this Court held:

"McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause."

A footnote in the opinion in the *McLeod* case cites cases holding that cooks employed to feed production workers are within the Act.

It would seem, therefore, that sales agencies, while engaged in interstate commerce, are not engaged in the production of goods for commerce and so even if elevator operators and porters may be considered to have a sufficiently close tie with the sales activities carried on in this building so as to make their work necessary to such activities within the meaning of the Statute, such maintenance workers would not, because of that (assumed) fact, be covered by the Act.

The holding herein that sales agencies are engaged in the production of goods for commerce conflicts with the decision in *Johnson v. Downtown Development Co.*, 132 F. 2d 287 (CCA 5th) cert. den. 318 U. S. 790.

In the *Johnson v. Dallas Downtown Development Co.* case, there were the following among the 31 tenants occupying the building involved in that case:

The Texas Daily Press League—an advertising organization as a result of its efforts "maps and plates are sent by advertisers outside of Texas to newspapers located in Texas" (Rec., pp. 18-19).

A manufacturer's agent, representing companies outside of Texas, who "maintains a small stock of regulators for controlling air in his office and made deliveries" (Rec., pp. 19-20).

A non-profit trade association of newspapers which sends out "bulletins through the mail" and acts as a general clearing house for information and trade problems (Rec., pp. 22-23).

An advertising agency, which places advertising "outside of Texas for clients inside of Texas, including placing advertising in national magazines, arranging radio broadcasts and sending copies, mats, transcriptions, checks, contracts and correspondence * * * to points outside of Texas" (Rec., p. 27).

A branch of the International News Service, a press association, "engaged in furnishing news and feature material for newspapers with headquarters in New York City". This organization has a "teletype connection to points outside of Texas over which it receives and transmits news" (Rec., pp. 27, 28).

An agency of a manufacturer of proprietary remedy—"orders filled by shipments from the stock maintained in this office, which is replenished by order from San Francisco; shipment is made * * * to and from points outside of Texas" (Rec., p. 30).

A representative of Southwest Carbon and Ribbon Co., "makes sales outside of Texas and ships the merchandise from this office to such points; he does no manufacturing but does cut typewriter ribbons into shorter lengths, inserts fasteners and winds them on spools for sale and then ships some of them to points outside of Texas" (Rec., p. 32).

The 5th Circuit did not consider these sales agencies necessary to production, saying:

"So that whether we look alone to the wordings of Sections 6(a) and 7(a) respecting the 'production of goods for commerce' or the definition of 'produced' found in Section 3(j) of the Act, it is perfectly clear that neither Appellants nor any person with whom Appellants had any sort of contact or sustained any kind of relation was engaged in or about the building in the production of goods for commerce within the meaning of the Act" (p. 289).

The 3rd Circuit Court of Appeals in *Blumenthal v. Girard Trust Co.*, 141 F. 2d 849, also rejected the claim that a wholesaler is engaged in the production of goods for commerce within the meaning of the Act. There, the action was instituted by a janitor who claimed to be necessary to production because of a tenant's receipt and shipment of automobile parts in interstate commerce. In dealing with this contention, the Court said:

"Under the present facts the manufacture of the automotive parts had been concluded prior to the parts being received by the tenant at all. There was nothing he did with them, that rendered them any more complete or that was intended to be an operation necessary to their final development. He merely wrapped and mailed out the merchandise in exactly the same condition as it was when turned over to him. He was in no way connected with the process of production of the automotive parts themselves."

POINT IV.

The holding of the court below that maintenance workers are covered because their activities are necessary to those who prepare advertising is in conflict with the decision in *Walling v. Goldblatt Bros.*, 128 F. 2d 778 (CCA 7th) cert. den. 318 U. S. 757.

Walling v. Goldblatt Bros., 128 F. 2d 778 (CCA 7th) cert. den. 318 U. S. 757, dealt with the claims of warehouse and other employees of the defendant which operates ten department stores in Illinois and Indiana. The 7th Circuit in that case held that some employees were covered by the Act and others were not, and that those workers who were engaged in "preparing * * * advertising copy are not subject to the Act" (p. 784 of 128 F. 2d).

If those preparing advertising copy are not engaged in commerce or in the production of goods for commerce, *a fortiori*, building maintenance employees would not be engaged in production of goods for commerce by reason of their relationship with those who prepare the copy.

In *Lofther v. First Nat. Bank of Chicago*, 48 Fed. Supp. 692, 697, affirmed CCA 7th, 138 F. 2d 299, Judge Sullivan gave consideration to the question we are here discussing. He took the view that

"reports, statements, and other written materials received by and emanating from the offices of banks and of the tenants"

constituted "goods" as defined by the Act. He said, however:

"I am convinced that the janitors and elevator operators, by reason of their activities are not so engaged in * * * the production of these goods for commerce, as to bring them under the provisions of the Act * * *"

POINT V.

The decision of the Circuit Court of Appeals herein should be reviewed because of the important questions involved.

Except through repeated denials of certiorari, this Court has not indicated its views and it has not directly passed upon the coverage of office building maintenance employees.

The Second Circuit Court of Appeals in this case has expressed disagreement with the conclusions reached in cases which were left undisturbed upon certiorari application to this Court.

If the decision in this case is not reviewed, owners of hundreds of office buildings in the Second Circuit will be confronted with liabilities not only for overtime wages covering a period of six years, but also for liquidated damages and counsel fees, while building owners in other jurisdictions will be free from such liability.

The determination which we ask this Court to review also affects wholesalers doing intrastate business, and sales and advertising agencies and other firms, whose business is (remotely) related to manufacturing and mining.

In the numerous decisions construing the Fair Labor Standards Act, the courts have drawn lines suggested by Mr. Justice Frankfurter in *Kirschbaum v. Walling*, *supra*. These lines, until now, have been fairly clear. To be con-

sidered "necessary" to production an employee's work had to have a "close"—not indirect—relationship with actual production of goods.

If the determination of the Court below remains in effect, great confusion will be caused and numerous employers who, as in this case (R. 1052), compensate their employees to an extent well in excess of the requirements of the Act will be liable to penalties as a result of their arrangements of hours and wages in reliance upon what seemed to have been a well settled interpretation of the provisions of the Act.

The ruling in this case is much more far reaching than that in *Borella v. Borden, supra*. Certiorari having been granted by this court in the *Borella* case, this application should likewise be granted. That the Circuit Court in dealing here with a multi-tenanted office building, extended its definition of "necessary to production" beyond its holding in the *Borella* case, is made clear by the Wage and Hour Administrator's brief in Circuit Court in the *Borella* case, where he said:

"The building herein involved is used as headquarters for directing and controlling the manufacture of all of the Borden products."

"Moreover, whatever may be said of other multi-tenant office buildings, this building was devoted primarily to the production of goods and plaintiffs were employed there because they would facilitate the company's business of producing goods." (Italics ours.)

In *Kirschbaum v. Walling*, 316 U. S. 517, and in later cases, in which the Fair Labor Standards Act has been construed, this court, again and again, has pointed out that Congress, in enacting said Act, did not exercise its full con-

stitutional power. It did not, as was done in the case of the amendment to the Federal Employers' Liability Act, extend coverage "to employees who 'shall in any way directly or closely and substantially affect interstate commerce' 53 Stat. 1404". *Kirschbaum v. Walling*, 316 U. S. 517, 522.

As pointed out in said case:

" * * * when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." (p. 522 of 316 U. S.)

If the determination of the court below remains undisturbed and if this court's definitions of "necessary to production of goods for commerce" are discarded, as was done in this case, there will be no field of endeavor left to local control.

Those who purchase goods are just as necessary to production as those who sell goods. Those who feed, transport and house salesmen, whether it be at a hotel or any other place are just as necessary to production as were the maintenance workers in this case.

Such an extension of the coverage of the Act would, it is clear, deserve "the stigma of judicial legislation".

CONCLUSION.

It is respectfully submitted that the petition for Writ of Certiorari in this case should be granted.

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Civil - Supreme Court, U. S.

FILED

MAR 12 1945.

CHARLES ELMORE DROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA,
JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALIEF,
FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE
MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ,
CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO
CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO,
SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KAS-
SABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL,
PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE
TROY, JOSEPH S. RAYZAK, HERBERT B. MCCLELLAND, THOMAS
ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE
A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ,
SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KAS-
SAB, JOSEPH CEFAT, JOSEPH HERRERA, EMIL J. CISEK; and CHARLES
G. BORG, suing in behalf of themselves and all other employees and
former employees of defendants similarly situated.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

JOSEPH M. PROSKAUER,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA,
JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALFEE,
FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISIDORE
MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ,
CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO
CHVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO,
SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KAS-
SABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL,
PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE
TROY, JOSEPH S. RAYZAK, HERBERT B. MCCLELLAND, THOMAS
ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE
A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ,
SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KAS-
SAB, JOSEPH CEFAT, JOSEPH HERRERA, EMIL J. CISEK, and CHARLES
G. BORG, suing in behalf of themselves and all other employees and
former employees of defendants similarly situated.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Circuit Court of Appeals (R. 339-343 *) is reported in 146 F. 2d 438. The opinion of District Judge Murray Hulbert (R. 312-321) is reported in 51 F. Supp. 528.

* References are to pages in the Transcript of Record as reprinted for this court.

Jurisdiction

The opinion of the Circuit Court of Appeals was handed down November 13, 1944 (R. 339) and its judgment was entered on December 27, 1944 (R. 345). The petition for certiorari herein was filed January 6, 1945 and was granted February 12, 1945 (R. 346). The jurisdiction of the court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Questions Presented in This Case and in *The Borden Company v. Borella*, No. 688

This court has directed that this case be heard with No. 688 (346).

In both cases the Second Circuit Court of Appeals rejected the conclusion reached in the other circuits that maintenance employees of office buildings are not covered by the Fair Labor Standards Act.

In both cases said court held, at variance with other circuits, that administrative and financial activities, conferences, keeping of records and conducting correspondence constitute production of goods for commerce, where the company carrying on such activities is *elsewhere* engaged in the actual production of goods.

In both cases the work of maintenance employees of office buildings has been held "necessary to the production" of goods by reason of the fact that occupants of the building were held to be engaged in activities "necessary" to actual production in distant places.

In both cases the Second Circuit Court of Appeals has completely disregarded this court's definitions of "necessary to the production of goods for commerce" and has

failed to heed its admonition that, in interpreting the Fair Labor Standards Act, lines must be drawn so as to give effect to the legislative intention *as expressed in the Act* and that, in these cases, the courts should not indulge in "judicial legislation" (*Kirschbaum v. Walling*, 316 U. S. 517; *Western Union Telegraph Co. v. Lenroot*, U. S. , 89 L. ed. 289, decided January 8, 1945).

Both cases illustrate the *reductio ad absurdum* argument of an endless chain of employees "necessary" for production apprehended by Mr. Justice Roberts in his dissenting opinion in *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, and wholly disregard the way this was met in *Kirschbaum v. Walling*, *supra*, where this court stated that "lines are to be drawn" by "the gradual process of inclusion and exclusion".

Differences between the *Borden* case and the case at bar

In this case the Second Circuit extended its previous ruling in No. 688 so as to make the Act apply to maintenance workers of practically all multi-tenanted office buildings:

The Borden decision was based on two factors not present in this case:

1. The Borden Company, a manufacturer of milk products, itself owned and occupied 58% of the rentable area of the building and was the employer of the respondents in that case, which facts, the Circuit Court held, brought the workers

"nearer to 'production' than were the employees in *A. B. Kirschbaum v. Walling*, Administrator, *supra*, 316 U. S. 517 * * *" (145 F. 2d 63, 65).

2. Stressed also was the fact that from its offices in the Borden Building the entire manufacturing business of the owner was supervised, managed and controlled.

In this case the owner of the building is engaged solely in the management and operation of an office building. It is not a manufacturer and does not use any of the space in its office building except in connection with the management of said building.

The Circuit Court of Appeals did not find—and the undisputed evidence in the case would not support a finding—that there was any substantial use of the offices in the building herein in directing the production of any goods anywhere.

In the case at bar the holding of the court below was based upon the fact that more than 20% of the building was occupied by sales and executive offices of manufacturing and mining concerns and sales agents of said firms.

In order to arrive at the 20% degree of occupancy—used as the test of substantiality—the Circuit Court had to and did hold that sales offices and sales agencies are producers of goods for commerce. This, on the theory that selling constitutes “handling” and that sales contracts bring about transportation of goods in commerce and, therefore, are “necessary” to “transporting” within the meaning of the Fair Labor Standards Act.

Statement of the Case

The Circuit Court of Appeals for the Second Circuit has held that respondents, elevator operators, porters, watchmen and other maintenance employees (R. 309-312) employed by the petitioner in its office building at 10 East 40th Street, in the City of New York, were engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 [29 U. S. C., Sec. 207(a)] essentially because more than 20% of said office building was occupied by sales and executive offices of tenants elsewhere engaged in manufac-

turing or by sales agencies of such companies and, therefore, were entitled to overtime compensation, liquidated damages and counsel fees under said Act (R. 339).

The Circuit Court of Appeals made that ruling in reversing a judgment of the United States District Court for the Southern District of New York, which dismissed respondents' complaint on the merits (R. 333).

Nature of building's occupancy

The facts are not in dispute.

Petitioner, a New York corporation, owns a multi-tenanted forty-eight-story and basement office building at 10 East 40th Street in New York City. Its business consists of the management and operation of and rental of space in said building, where respondents are employed as maintenance workers (R. 307-312).

The building may be fairly described as a typical metropolitan office building.

It is undisputed, and the trial court found, that there was "no manufacturing of any kind carried on in the office building" (R. 316). The trial court also made, and the Circuit Court of Appeals did not reverse, the finding that the amount of space utilized in the building

"in connection with the publicity and advertising prepared in or outside of the building . . . in relation to the entire volume of business transacted and carried on by the tenants at and from said premises is not substantial" (R. 316).

During the period covered by the complaint there were in all 111 tenants who occupied 89% of the rentable area of the office building herein (R. 313).

The Circuit Court of Appeals summarized the occupancy of the building as follows:

"(1) Executive and sales offices of twenty concerns carrying on elsewhere the business of manufacturing and mining. The offices are used for executive and administrative activities, for conferences and for taking orders for substantial quantities of merchandise of considerable value manufactured and shipped, from factories and mines elsewhere located, to customers in several states.

"(2) Offices of sales agencies representing seventeen manufacturers and mining concerns carrying on elsewhere the business of manufacturing and mining. The offices in the building are used to sell a variety of the products of the company they represent. As a result of the efforts of these agencies substantial amounts of merchandise of considerable value are shipped across state lines from factories, mines, and warehouses, elsewhere located in various parts of the country.

"(3) Twenty-four lawyers and law firms carrying on the usual activities incident to the practice of law.

"(4) The United States Employment Service which places white-collar workers in various factories and business houses.

"(5) Advertising agents and publicity and trade organizations* which carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm† is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm. The officers and employees of the trade organiza-

* The total space occupied by this group is 15,520 sq. ft. 9,010 sq. ft. is occupied by two public relations counsel (R. 83, 89-95); 875 sq. ft. by an advertising agency (R. 103, 105-106); 215 sq. ft. by a commercial artist (R. 202-205) and the remaining 13,520 sq. ft. by trade organizations whose principal function is to gather and disseminate trade information (R. 134, 136-137, 292-295, 244-245, 260-264, 189-192).

† This tenant, Standard Magazines, is included among the executive offices in class 1.

tion or principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

"(6) Engineering and construction firms which carry on their correspondence and executive and administrative activities from the offices in this building.

"(7) Investment, financing and credit organizations which use their offices for their executive and administrative work. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

"(8) Offices of import and export firms which make arrangements for export and import of a variety of goods of substantial value.

"(9) Miscellaneous tenants including dentists, charitable organizations, etc., whose activities are not interstate in character" (R. 340-341).

Making contracts for the sale of goods held to constitute production of goods for commerce

Rejecting respondents' contention that they were covered by the Act because they were "engaged in commerce" (R. 342), the Circuit Court held that tenants were, nevertheless, engaged in activities "necessary to the production of goods for commerce" and that therefore respondents were "necessary" to such production within the meaning of the Fair Labor Standards Act. In doing so the court considered the space occupied by said group of tenancies, holding:

1. "That the investment, finance and credit organizations, the engineering and construction firms, as well as the lawyers, the United States Employment Service and the miscellaneous tenants described above are not engaged in the production of goods for commerce. These tenants

occupy about 44% of the available space and 49% of the rented part of the building."

2. That the executive and sales offices of manufacturing and mining concerns in class (1), which occupy 26% of the rentable area and 29% of the rented space in the building, were engaged in production.

[Ten of the twenty offices, using approximately half the total space occupied by this class (60,470 sq. ft.) were purely sales offices. * United Feldspar Co., a mining company, maintained an office (980 sq. ft.) for letter-writing purposes only (R. 248-251), Eastman Kodak Co. (4,450 sq. ft.) for publicity work (R. 69), Beechnut Packing Co. (2,690 sq. ft.) for convenience in conferring with advertising agencies, publishers and radio stations in New York City (R. 101-102) and Cluett, Peabody & Co. (10,010 sq. ft.) for purchasing materials, selling neckwear and arranging advertising (R. 234-238). None of these fourteen offices, occupying 48,050 sq. ft. of the total of 60,470 sq. ft. for the whole class, or 79.4% thereof, had anything to do with actual production. The remaining six tenants occupy approximately 5.1% of the rentable area of the building.]

* Manufacturing companies using offices as sales offices only:

	Space	
Ames Bag Machine Co.	300 sq. ft.	(R. 228)
Blackinton & Co.	980 "	" (R. 193)
Chase Brass & Copper Co.	12,155 "	" (R. 195-197)
J. H. Dunning Corp.	1,110 "	" (R. 161-164)
Thomas A. Edison Co., Inc.	2,500 "	" (R. 111-112)
General Motors Cleveland Diesel Engine Division	2,140 "	" (R. 61-62)
Perolin Company of New York	1,990 "	" (R. 209-210)
Tennessee Eastman Corp.	920 "	" (R. 64)
Vanity Fair Mills	6,415 "	" (R. 165)
S. S. White Dental Mfg. Co.	1,510 "	" (R. 175)

30,020

3. That the publicity concerns occupying 6.5% of the rentable area and 7.5% of the rented area were likewise engaged in production.

4. That sales agencies representing mining and manufacturing concerns, which occupy 9.5% of the available area and 10.5% of the rented area, were engaged in production because the contracts procured by them caused goods to be transported and they were thus "'necessary' to the 'transporting'", that sales agents "may be considered as engaging in 'handling' the goods by arranging their transfer from one person to another" and that selling is "economically necessary" to production (R. 341-343).

The Circuit Court adopted 20% as the measure of substantiality (R. 342). Based upon that test, tenants occupying a substantial amount of space were found to be engaged in activities thus held to be "necessary" to the production of goods.

Without considering the relationship between respondents' maintenance activities and those of the tenants, said court held that because the tenants' activities were necessary to production, respondents' activities being necessary to the tenants, they were likewise engaged in production. In reaching such conclusion the Circuit Court of Appeals stated that other Circuits

"which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case (No. 688) and to which we shall adhere here" (R. 343).

Since the publicity concerns occupy a very small fraction of the space in the building and since the great majority of the other tenants, held to be producers, use their offices as sales offices (of manufacturing companies or of agencies representing them), the chief questions for determination herein are whether selling constitutes "produc-

tion of goods for commerce" and whether maintenance workers are "necessary" to such "production".

Relevant Provisions of Statute Involved

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Secs. 201-219).

"Sec. 3. As used in this Act—

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof" [29 U. S. C., Sec. 203(b)].

"(i) 'Goods' means goods (including ships and marine equipment); wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof" [29 U. S. C., Sec. 203(i)].

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" [29 U. S. C., Sec. 203(j)].

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" [29 U. S. C., Sec. 207(a)].

Section 16(b):

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" [29 U. S. C., Sec. 2166].

Specification of Errors

The Circuit Court of Appeals erred in holding

(1) that administrative activities in offices of companies elsewhere engaged in manufacturing and mining constitute "production of goods for commerce" within the meaning of the Fair Labor Standards Act;

(2) that selling goods constitutes "production of goods for commerce" within the meaning of said Act;

(3) that offices of an advertising agency, public relations counsel and trade organizations are producers of goods;

(4) that maintenance employees of this office building whose work may be "necessary" to its tenants, whose

activities in turn are necessary to the activities of still others engaged—in distant places—in the actual production of goods, are themselves engaged in the “production of goods for commerce” within the meaning of said Act;

(5) that the work of maintenance workers of this office building had a sufficiently close tie with the activities of the tenants’ office employees as to make such maintenance work “necessary” to “production” within the meaning of said Act;

(6) that 20% is a proper test of substantiality in determining whether an office building is devoted to production;

(7) that respondents were engaged in the production of goods for commerce within the meaning of said Act.

Outline of Argument

This court’s decision in *McLeod v. Threlkeld*, 319 U. S. 491, has made it clear, as found by the court below, that respondents were not “engaged in commerce” within the meaning of the Fair Labor Standards Act.

Since respondents concededly did no “producing, manufacturing, mining, handling, (or) transporting * * * of goods, the sole question is whether they were engaged in an “occupation necessary to the production thereof”.

• Petitioner claims that they were not so engaged because:

1. The courts, federal and state, with the exception of the Second Circuit Court of Appeals, have uniformly and correctly differentiated between the work of maintenance employees of factory buildings and those of multi-tenanted office buildings and this court, in seven cases, has left undisturbed their ruling that the work of office building service employees is not “necessary” to production.

2. The fact that some of the office tenants of the building herein were elsewhere engaged in manufacturing and

mining did not make the work of petitioner's maintenance employees "necessary" to such production in distant places.

3. The sales activities of manufacturing and mining companies and sales agencies whose offices were located in the building herein did not constitute "production of goods for commerce" and, therefore, the building service employees could not, by reason thereof, be held to be "necessary" to production within the meaning of said Act.

4. Employees of tenants working on publicity and advertising are not producers of goods for commerce. Even if they were, however, respondents in maintaining the building did not have a sufficiently close tie with such activities as to make them "necessary" thereto within the meaning of said Act.

5. The 20% test of substantiality adopted by the Circuit Court of Appeals is improper. However, even under such test, the building herein was not devoted to the production of goods for commerce.

POINT 1

The courts, except for the Second Circuit Court of Appeals, have uniformly held and, in seven cases, this court has left undisturbed the ruling, that the work of maintenance employees of multi-tenanted office buildings—such as the one involved in this case—is not covered by the Fair Labor Standards Act.

Scores of cases involving office buildings were instituted following the decision in *Kirschbaum v. Walling*, 316 U. S. 517, in which this court held that maintenance employees of *left* buildings "principally devoted" to the *manufacture* of goods for commerce were covered by said Act because their work

had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employers are to be regarded as engaged in an occupation necessary to the production of goods for commerce.

In reaching its conclusion in the *Kirschbaum* case this court made it clear, however, that Section 3(j) of the Act did not contemplate the inclusion of the work of an employee having "only the most tenuous relation to" the production of goods and that lines would have to be drawn by using "something of that common sense accommodation of judgment to kaleidoscopic situations".

Thereafter, when multi-tenanted office building cases reached the courts, they consistently and correctly distinguished the work of maintenance employees of office buildings from the work of factory-loft building employees, and held the former to be outside the purview of said Act.*

* *Johnson, et al. v. Dallas Downtown Development Co.*, 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790; *Stoike v. First National Bank of New York*, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11, 1943; *Tate v. Empire Building Corp.*, 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11, 1943; *Johnson v. Masonic Building Co.*, 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28, 1944; *Rucker, et al. v. First National Bank of Miami, Okla.*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31, 1944; *Rosenberg (Lorenzetti) v. Semaria*, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18, 1943; *Convey v. Omaha Nat. Bank*, 140 F. 2d 640, CCA 8th, cert. den. 321 U. S. 781, March 6, 1944; *Lofthier v. First National Bank of Chicago*, 48 F. Supp. 692, aff'd CCA 7th, 138 F. 2d 299; *Patterson, et al. v. Memphis Cotton Exchange Realty Co., Inc.*, Tenn. Chancery Court, 6 WHR 308; *Brandell, et al. v. Continental Illinois National Bank Co.*, 43 F. Supp. 781; *Cochran v. Florida National Building Corp.*, 45 F. Supp. 830, aff'd CCA 5th, 134 F. 2d 615; *Building Service Employees Union, Local 238 v. Trenton Trust Co.*, 53 F. Supp. 129, aff'd CCA 3rd, 142 F. 2d 257; *Baum v. A. C. Office Building Co.*, Kansas Sup. Ct., 6 WHR 1236, November 6, 1943; *Hinkle v. Frank Nelson Bldg.*, 7 WHR 689, Alabama Supreme Court; *Hinkler v. 83 Maiden Lane Corporation*, D. C. N. Y., 50 F. Supp. 263; *Wideman v. Blanchard & Calhoun Realty Co.*, D. C. Ga., 50 F. Supp. 626; *Matter of Liquidation of N. Y. Title & Mort. Co.*, 179 Misc. 789; *Johnson v. Great Nat. Life Ins. Co.*, Tex. Civ. App., 166 S. W. 2d 935; *Johnson v. Filstow*, 43 F. Supp. 930, D. C. Fla.; *Belies v. Penn Bldg., Inc.*, Appellate Term, 1st Dept., 180 Misc. 1062, aff'd 267 App. Div. 955; *Cullen v. Stone & Webster Building, Inc.*, 7 WHR 147, D. C. N. Y., December 24, 1943; *Blumenthal v. Girard Trust Co.*, 141 F. 2d 849, CCA 3rd; *Baldwin v. Emigrant Ind. Sav. Bank*, D. C. N. Y., 7 WHR 831; *Bozant v. Bank of New York*, 8 WHR 68 (not officially reported), U. S. D. C., S. D. N. Y.; *Greene v. Anchor Mills Co.*, 8 WHR 41 (not officially reported), North Carolina Supreme Court, December 14, 1944.

Seven applications for certiorari were made to this court in office building cases and in each one of them this court left undisturbed the holdings of the courts below that maintenance workers in those cases were not "engaged in commerce" or in work "necessary to the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Johnson, et al. v. Dallas Downtown Development Co., 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790;

Stoike v. First National Bank of New York, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11, 1943;

Tate v. Empire Building Corp., 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11, 1943;

Johnson v. Masonic Building Co., D. C. Ga., 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28, 1944;

Rucker, et al. v. First National Bank of Miami, Okla., 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31, 1944;

Rosenberg (Lorenzetti) v. Semaria, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18, 1943;

Convey v. Omaha Nat. Bank, 140 F. 2d 640, CCA 8th, cert. den. 324 U. S. 781; March 6, 1944.

This court observed in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, that

" * * * legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

"Ordinary" laymen have read the Fair Labor Standards Act to mean that an elevator operator of a multi-tenanted office building is not engaged in the production of goods for commerce.

This is not strange in view of the fact that upwards of 100 judges of federal and state courts have similarly interpreted the statute.

The explanation for the divergent views of the Second Circuit Court of Appeals may be found in the reasoning of its opinion in the *Borden Co.* case to which it expressly adhered in this case:

(a)

This court in *Western Union Telegraph Co. v. Lenroot*, U. S. , 89 L. ed. 289, pointed out:

"But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it."

The Second Circuit refuses to follow this rule and says in the *Borden Co.* case:

"We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time" (p. 64 of 145 F. 2d).

(b)

This court in *Kirschbaum v. Walling*, supra, pointed out that where Congress adopted "a new scheme for Federal industrial regulation" it may not be assumed that "it thereby deals with all situations falling within the general mischief which gave rise to the legislation", particularly where the mischief is the concern of both state and federal governments.

The Second Circuit refuses to follow this, and says:

"We can therefore see nothing in the language used which should limit the general purpose . . . and it appears to us that any hesitation to give that purpose

its full scope must proceed from a vague compunction that to press the statute so far, is unduly to invade fields which Congress must have meant to leave to local regulation. We do not share that compunction" (p. 65 of 145 F. 2d).

(c)

This court said in the *Kirschbaum* case:

" . . . when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation" (p. 522 of 316 U. S.).

The Circuit Court of Appeals refused to follow this and found it to be the court's function to carry out the purpose of the Act in "its full scope", unless deterred by limiting language in the Act itself.

This case illustrates the danger of such "retrospective expansion of meaning" indulged in by the Circuit Court. As found by the trial court:

" . . . the lowest paid individual plaintiff and the individual plaintiff working the longest number of hours per week were paid amounts in excess of what they would have received had they been paid the minimum wages for standard hours as provided by the Act and one and a half times such minimum hours worked in excess of such standard hours" (R. 317).

Had Congress made it clear that office building maintenance workers were to be covered by the Fair Labor Standards Act, their hours of employment might have been reduced prior to October 24, 1938, when the Act became effective, or agreements entered into, providing for a lower hourly wage with time and a half for hours worked in excess of the maximum hours provided by the Act. Compare *Walling v. A. H. Belo Corp.*, 316 U. S. 624.

Instead, unless the decision of the Circuit Court of Appeals herein is reversed, the petitioner is required to pay overtime compensation, plus liquidated damages and counsel fees, because the court below, six years after the statute's enactment, expanded its meaning to include respondents on the theory that Congress, without having said so, would have desired their inclusion if the matter "had been presented to it" at the time the statute was drafted.

POINT II

The Circuit Court of Appeals erred in ruling that the maintenance employees of petitioner's office building were "necessary" to production by reason of the fact that some of the tenants in the building were elsewhere engaged in manufacturing and mining.

Of the twenty tenants making up class 1—the manufacturing and mining tenants—ten, occupying approximately half the space of the entire group, are engaged in purely sales activities. Four other tenants occupying approximately one-fifth of the total space for this group use their offices for carrying on correspondence and for conferences on advertising, publicity, purchasing materials and selling.

Only an infinitesimally small percentage—about 5.1%*—of the rentable space of the building herein is used for executive offices and there is no finding that any space is used for the direction of production elsewhere.

With one of the bases for the decision in the *Borden* case absent from this case—direction of production in distant places—the questions presented respecting this group of tenants are:

(1) whether office workers in an office building in New York may be said to be engaged in the production

* See p. 8, *supra*.

of goods for commerce because their employers are elsewhere engaged in manufacturing or mining; and

(2) whether an elevator operator or a porter may be held to be covered by the Act because his activities are necessary to office employees, whose work in turn bears this tenuous relationship to the manufacture or mining of goods in distant places.

The term "necessary" as used in Section 3(j) is not defined in the statute. However, this court has had occasion to define that term in the following cases: *Kirschbaum Co. v. Walling*, 316 U. S. 517; *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88; *Walton v. Southern Package Corp.*, 320 U. S. 540; *Armour & Co. v. Wantock*, 323 U. S. 126, decided December 4, 1944.

In the *Kirschbaum* case Mr. Justice Frankfurter defined work "necessary" to production to mean work having "a close and immediate tie with the process of production" and he stated further that where the work of an employee "has only the most tenuous relation to" the production of goods, such work is not to be considered "necessary" (p. 525 of 316 U. S.).

Similar definitions were employed in the other cases wherein those who dug wells were held engaged in the production of oil and watchmen and firemen employed to protect goods in the process of production were held to have a sufficiently close and direct relationship with actual production to make them "necessary" to such production.

We do not contend that in order for one's work to be "necessary" to production it must be indispensable (as claimed in *Armour v. Wantock*, supra) or that there must be physical contact with the goods produced, but that is a far cry from saying that an elevator operator who transports a stenographer to her office at 10 East 40th Street is a producer of automobiles because she works for the General Motors Company which produces automobiles in Detroit, Michigan.

But even if we assume *arguendo* that the employees of General Motors and the other manufacturing companies were engaged, at their offices at 10 East 40th Street, in activities necessary to their company's manufacturing elsewhere, that does not *ipso facto* make the elevator operator or the porter necessary to General Motors' production in Detroit.

As we see it, those who are necessary to the work of others, who, in turn, are necessary to the work of still others elsewhere engaged in actual production, are not themselves engaged in production. Those who are twice removed from production do not have a "close and immediate tie with" production.

If "necessary to the production" as used in the statute does not mean necessary to actual production there would be no end to the chain of producers. If elevator operators are producers of goods because they are necessary to administrative employees, salesmen or stenographers, who, in turn, may be necessary to manufacturing in another state, then those who transport the elevator operators and porters to their work would likewise be necessary to production.

Other Circuit Courts have met the problem here presented by "drawing lines" and following definitions laid down by this court in the *Kirschbaum* and later cases.

Thus, in *Johnson v. Masonic Bldg. Co.*, 138 F. 2d 817, cert. den. 321 U. S. 780, there were a number of tenants who produced goods outside of their offices in the building involved in that case. Referring to such occupancy the Fifth Circuit Court said:

"The building employees are not doing anything that is necessary to or even directly contributes to such production. The case is not like *Kirschbaum v. Walling*, 316 U. S. 517 [5 WHR 442], where the building was devoted to the production of such goods. If the office

men of Merry Bros. Brick and Tile Company and Southeastern Bituminous Company can be said to be producers of goods, the appellants, employed by another employer with no especial reference to the business of any tenant, cannot be held to be so engaged because these tenants were producing goods elsewhere."

In *Rucker v. First National Bank of Miami*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, the court found that the building therein was occupied by executive and administrative offices of a mining and smelting company, the executive offices of a railroad company, the office of the company engaged in selling chat and crushed rock, an abstract company, the sales office of an extension university, sales office of DuPont Co., brokers, etc.

Referring to this type of occupancy the court said:

"Specifically, we are urged to hold that these employees, as elevator operators, were engaged in the production of goods for commerce on the authority of *Kirschbaum Co. v. Walling*, *supra*.

• • • • •

"But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the *Kirschbaum* case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators; and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company; and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. In any event, the relationship is not shown to be 'close and immediate'. Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce" (at p. 702). (Italics ours.)

In *Greene v. Anchor Mills Co.*, 8 WHR 41 (not officially reported), North Carolina Supreme Court, December 14, 1944, building service employees of an office building were held not to be covered by the Act, although their employer occupied part of the building and from there directed the activities of its mills, elsewhere located, and despite the further fact that fourteen offices in the building were occupied by ten manufacturing firms elsewhere engaged in manufacturing.

These courts, it is submitted, have correctly applied the definitions found in the Act and have followed the directions of this court in using "that common sense accommodation of judgment of kaleidoscopic situations". *Kirschbaum v. Walling*, supra.

POINT III

Sales activities of tenants elsewhere engaged in manufacturing and mining or of sales agencies representing such companies do not constitute production of goods for commerce within the meaning of the Fair Labor Standards Act.

As already indicated, no substantial amount of space was occupied in the building herein for executive offices. Half the manufacturing and mining tenants (occupying approximately half the total space of this class of tenants) used their space solely for sales offices. It follows that the real question in this case is whether elevator operators, porters *et al.* who serve those who make contracts for the sale of goods in sales offices of manufacturing and mining companies or their sales representatives are engaged in the production of goods as defined by the Fair Labor Standards Act.

The Circuit Court held that they are, saying:

"The Act covers 'goods' until 'their delivery into the actual physical possession of the ultimate consumer'."

Section 3(i) [29 U. S. C. A. §203(i)]. And 'production' is defined to include 'handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof'. Section 3(j) [29 U. S. C. A. §203(j)]. Thus, transportation of goods until their delivery to the ultimate consumer is 'production' as defined by the statute. A sales agent who procures the contracts in performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting'.

* * * * *

"Moreover, sales agents may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another" (R. 342-343).

That the foregoing reasoning is fallacious, has since been determined by this court's reversal of the Second Circuit's earlier decision in *Western Union v. Lenroot*, —U. S., 89 L. ed. 289, decided January 8, 1945.

In that case this court rejected the contention that one is engaged in production if he "handles" goods unless the handling takes place in connection with the "making of an article ready to enter interstate transit":

"The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on'. These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product or

bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce."

This court, in the same case, also held that one who is engaged in transporting goods after their completion is not engaged in production:

"If we go beyond this (the inclusion of 'every kind of incidental operation preparatory to putting goods into the stream of commerce') and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended. . . . Section 15(a) makes it unlawful to transport or ship goods in the production of which any employee was employed in violation of the wage and hour provisions. But it makes this exception: 'except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier.*' (Italics supplied.) This recognizes a distinction between handling in transportation and producing, which is entirely put to naught by the Government's contention that by definition everyone who handles goods in carriage is thereby made a producer. The exception then is, as if it read 'the Act shall impose no liability on a common carrier for carrying goods that it does not carry'. One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that 'produced' means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all distinction between production and transportation."

In his dissenting opinion in the *Western Union* case, Mr. Justice Murphy makes it clear that the minority and

majority of this court disagreed, primarily, on the application of the rule to the particular facts in the *Western Union* case:

"Contrary to the view expressed in the majority opinion, the government does not ground its case in this respect on a claim that mere transportation of goods by a carrier such as Western Union constitutes a 'handling' or 'working on' so as to make that carrier a producer. The contention, rather, is that Western Union employees, *prior to the introduction of the messages into interstate commerce*, 'work on' and 'handle' the messages. And that contention would seem to be justified by the facts."

Since handling and transporting goods after their completion do not constitute production, an elevator operator who serves a salesman may not be held to be "necessary" to production because sales contracts effected by him cause the transportation and transfer of goods—already manufactured—"from one person to another".

The court below confused engagement in commerce with production of goods for commerce

The Circuit Court of Appeals states that the exemption of retail establishments, the greater part of whose selling is in intrastate commerce,

"would indicate that where the 'selling or servicing is in [interstate] commerce' the employees are to be included in the scope of the Act."

And that the Act

"specifically excludes employees engaged in 'marketing' and 'distributing' of certain designated products. By implication, marketing and distributing of other products would seem to be included within the Act" (R. 343).

The answer is that the retailers' exemption was necessary, not because retailers might be considered to be

engaged in production of goods, but because they would, otherwise, be held to be engaged in interstate commerce itself.

So also with respect to the exemption covering the marketing and distribution of certain products; those exemptions were necessary because a distributor or marketer might, otherwise, be held to be engaged in commerce itself. Cf. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Higgins v. Carr Bros. Co.*, 317 U. S. 572.

Therefore, sales offices, while engaged in commerce, are not engaged in the production of goods for commerce. Thus, even if elevator operators and porters may be considered to have a sufficiently close tie with the sales activities carried on in this building so as to make their work necessary to such commerce they would not, because of that (assumed) fact, be covered by the Act. *McLeoil v. Threkeld*, 319 U. S. 491.

That was the conclusion reached by the Third and Fifth Circuits in *Blumenthal v. Girard Trust Co.*, 141 F. 2d 849, and *Johnson v. Dallas Downtown Dev. Co.*, 132 F. 2d 287, cert. den. 318 U. S. 790.

In the *Blumenthal* case a maintenance employee contended that he was necessary to production because of a tenant's receipt and shipment of automobile parts in interstate commerce. In dealing with this contention the court said:

"Under the present facts the manufacture of the automotive parts had been concluded prior to the parts being received by the tenant at all. There was nothing he did with them, that rendered them any more complete or that was intended to be an operation necessary to their final development. He merely wrapped and mailed out the merchandise in exactly the same

condition as it was when turned over to him. He was in no way connected with the process of production of the automotive parts themselves."

"And in the *Johnson* case, in which a number of the tenants were manufacturers' agents, sales representatives, etc., the Fifth Circuit held that the maintenance employees were not covered by the Act, saying:

"it is perfectly clear that neither Appellants nor any person with whom Appellants had any sort of contact or sustained any kind of relation was engaged in or about the building in the production of goods for commerce within the meaning of the Act" (p. 289).

Economic necessity, no criterion

The final basis for the Circuit Court's ruling on this subject is that selling is "economically necessary" to production.

But the same may be said of many of the activities which in this very case were held not to constitute production: legal services, building construction, engineering, financial activities, etc. Some of these could have been included had Congress made the Act applicable to all activities "affecting commerce" as was done in the case of the National Labor Relations and other Acts of Congress. But, as pointed out by this court, that phrase was rejected in favor of the narrower definition of production.

If Congress intended so broad a field of activity as selling to be included as production, it would and should have been more explicit.

Selling may be "economically necessary" to profits. It is not directly necessary to production itself.

POINT IV

The publicity and advertising tenants were not engaged in "production". Even if they were, respondents in maintaining the building in which said activities were housed did not have a sufficiently close tie to the tenants' advertising and publicity activities as to make them "necessary" thereto within the meaning of the Fair Labor Standards Act.

Neither the trial court nor the Circuit Court found that a substantial amount of publicity and advertising activities were carried on in the building herein. The Circuit Court described the activities of this group of tenants, which occupies 6.5% of the rentable area of the building, as follows:

(5) Advertising agents and publicity and trade organizations which carry on publicity and advertising work using national publications, newspapers and radio. * * * The officers and employees of the trade organization are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

The building involved in *Johnson v. Downtown Development Co.*, 132 F. 2d 287 (CCA 5th), cert. den. 318 U. S. 790, is similar to the one involved in this case, except that the Dallas building is much smaller. Among the thirty-one tenants occupying that building there were a number of sales agencies and, in addition, the following advertising and publicity firms:

The Texas Daily Press League—an advertising organization—as a result of its efforts "mats and plates are sent by advertisers outside of Texas to newspapers located in Texas" (R. 18-19).

A non-profit trade association of newspapers which sends out "bulletins through the mail" and acts as a general clearing house for information and trade problems (R. 22-23).

An advertising agency which places advertising "outside of Texas for clients inside of Texas, including placing advertising in national magazines, arranging radio broadcasts and sending copies, mats, transcriptions, checks, contracts and correspondence" * * * to points outside of Texas" (R. 27).

A branch of the International News Service, a press association, "engaged in furnishing news and feature material for newspapers with headquarters in New York City". This organization has a "teletype connection to points outside of Texas over which it receives and transmits news" (R. 27, 28).

Yet the Fifth Circuit held that neither the tenants nor the maintenance workers in that case "were engaged in the production of goods for commerce in or about the building" (p. 289 of 132 F. 2d).

Walling v. Goldblatt Bros., 128 F. 2d 778 (CCA 7th), cert. den. 318 U. S. 757, dealt with the claims of warehouse and other employees of the defendant which operates ten department stores in Illinois and Indiana. The Seventh Circuit in that case held that some employees were covered by the Act and others were not, and that those workers who were engaged in "preparing * * * advertising copy are not subject to the Act" (p. 784 of 128 F. 2d).

If those preparing advertising copy are not engaged in the production of goods for commerce, *a fortiori*, building maintenance employees would not be engaged in production of goods for commerce by reason of their relationship with those who prepare the copy.

Even if this court were to hold that the tenants in this group were producers of goods for commerce, it cannot be said that the porters and elevator operators have a sufficiently close tie with the publicity, research and editorial work so as to be necessary to its production.

In *Lofther v. First Nat. Bank of Chicago*, 48 Fed. Supp. 692, 697, aff'd CCA 7th, 138 F. 2d 299, Judge Sullivan held that

"reports, statements, and other written materials received by and emanating from the offices of banks and of the tenants"

constituted "goods" as defined by the Act. He said, however:

"I am convinced that the janitors and elevator operators, by reason of their activities, are not so engaged in . . . the production of these goods for commerce, as to bring them under the provisions of the Act . . ."

POINT V.

The Circuit Court erred in holding that if 20% of the tenants of an office building are engaged in production of goods for commerce, the building service employees of said building are covered by the Fair Labor Standards Act. But even under that test respondents are not covered by said Act.

Based upon the Wage & Hour Administrator's promulgation on November 19, 1943 (five years after the enactment of the statute under consideration) the Circuit Court of Appeals held that 20% was the standard "for determining whether a substantial portion of the building is devoted to production for interstate commerce" (R. 342).

The difficulty with this rigid mathematical test is illustrated by what the same court said in a succeeding case. *Fleming, et al. v. Post, etc.*, 146 F. 2d 441, December 14, 1944. After repeating its holding in this case respecting the percentage of tenants the Circuit Court said:

"In deciding which of the occupants may be considered as engaged in the production of goods for interstate commerce, where any of them is so engaged but also in production for intrastate commerce, we are again faced with the necessity of discovering a quantitative standard. On this question we have no interpretation by the Administrator to assist us. The Supreme Court has indicated only that the tenants must be 'substantially' engaged in the production of goods for interstate commerce. *Walton v. Southern Package Corp.*, 320 U. S. 540. Once again we equate the term 'substantial' with the figure of 20%. We fully appreciate that under these criteria ~~it is possible~~ (although not so in this case) for building employees to be brought under the Act when but 4% of the activity of all the tenants may be categorized as production of goods for interstate commerce. But we feel that the decisions of the Supreme Court indicate such a result, and we must follow what seem to us the implications of these decisions; 'we are merely a reflector, serving as a judicial moon'."

Upon further analysis the 4% figure may be further reduced by reason of the fact that only a fraction of a tenant's activities may constitute production.

For example, Cherokee Spinning Co., which occupies 770 sq. ft. (R. 137) in the building herein (not included in the list of ten tenants who use their space exclusively for selling), uses its office mainly to "sell our merchandise, which is practically all of the products of the mill" (R. 138). However, one of the four employees, its telephone operator, sketches (on paper) designs for handkerchiefs "when she is not busy at the switchboard" (R. 142-143).

Assuming that such tenants were held to be engaged in production, a building could be held to be devoted to production of goods for commerce because 20% of its tenants devote 20% of their activities to the production of goods, 20% of which is distributed in interstate commerce. The net percent of production in interstate commerce could then, at least theoretically, be reduced to .8% of the total activities of the building.

It would seem, therefore, that the mathematical test applied by the Circuit Court, in this and the *Fleming* cases, is unrealistic and improper and that the test of substantiality should be fixed in a manner more reasonable and not nearly so rigid.

The office building herein is not devoted to production to the extent of 20%

What has been said respecting the rigidity and unreasonableness of the 20% test is not to be construed to mean that if that test is a correct one the building herein is devoted to production.

The decision of this court in *Western Union Telegraph Co. v. Lenroot*, supra, clearly demonstrates the incorrectness of the lower court's ruling that the selling activities of 27 tenants constitutes production. These tenants, 10 among the manufacturing and mining tenants and 17 sales agents, occupy approximately 23% of the rented area of the building.

We have demonstrated that employees of manufacturing and mining companies, which produce nothing in the office building herein, are not engaged in production.

Thus, even if the publicity concerns, occupying 6.5% of the rentable area and if the six among the manufacturing and mining tenants occupying 5.1% of the rentable area of the building, who carry on some executive and admin-

istrative activities, were held to be engaged in the production of goods and the work of the respondents necessary thereto, the total space thus used would be less than 12% of the rentable area of the building (pp. 7-9, supra).

CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

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CHARLES ELMORE DROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRÉD BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICAËLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. MCCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADORE SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAL, JOSEPH HERRERA, EMIL J. CISEK, and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR PETITIONER

JOSEPH M. PROSKAUER,
Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER

The Circuit Court has held that all office employees of manufacturing or mining companies, no matter what they do or where located, are necessary to and thus engaged in production and that, therefore, maintenance workers of buildings in which employees are housed are likewise so engaged.

The manufacturing tenants in this case maintain their offices largely as sales offices. And the Circuit Court has held that selling constitutes production of goods for commerce.

Briefs of respondents and Administrator deal most apologetically with this holding of the Circuit Court. They emphasize rather a factual contention (which we shall show to be baseless) grounded on nothing held either by the District or the Circuit Court. They claim that a substantial number of these manufacturing tenants are otherwise substantially engaged in actual production of goods in this building. This was found neither by the District Court nor the Circuit Court but we accept the challenge and we meet the point.

Using the technique of emphasizing the inconsequential, (A) the Administrator builds an unreal and distorted picture of remote control by "managerial" offices of manufacturing elsewhere carried on and (B) respondents describe many of the manufacturing tenants as "advertising, publicity and editorial offices".

We take up (A) and (B) successively.

A

The manufacturing companies do not substantially direct or control production from their offices in the building herein and a fortiori the elevator men are not engaged in production

The Administrator attempts to show a resemblance between the multi-tenanted office building in this case and the (Borden) building involved in No. 688.

After urging in No. 688 that the maintenance of its central office building is "... part of an integrated effort for the production of goods" (br. p. 20), he urges that the same is true here though conceding that the problem is "more complex" (No. 688, br. fn. p. 15).

The Administrator's brief speaks of the manufacturing companies' "managerial" offices. A table listing 16 of the

20 manufacturing tenants (classified by the Courts below as "Class I") appears in the footnote on page 12 of its brief. It is claimed that these tenants, who occupy 19.81%* of the total rentable area of the building, "carry on management activities closely integrated with their manufacturing elsewhere".

We will now demonstrate by quoting respondents' own witnesses that there is no substantial basis for including the following 11 tenants listed in said table of allegedly "integrated managerial offices":

(1)

J. H. Dunning Corp. (1,100 sq. ft.) conducts a sales office where it takes orders for wooden boxes, manufactured in Maine, Virginia and California (R. 162). The president of the company has an office in the suite.

The Administrator has seized upon a witness' flippant statement that the employees "don't blow a whistle without his [the president's] approval" and it is stated that this includes blowing the whistle regarding production. [Respondents state that the president indicates "the orders to be worked on" (p. 20).]

The answer to these contentions may be found in the following testimony elicited by respondents' counsel:

"Q. He instructs them what to make, I suppose?

A. No, that is hardly possible. . . .

Q. You have a foreman at these various factories?

A. That is right.

Q. Superintendents? A. That is right.

Q. And they control the actual process of manufacturing, don't they? A. That is right" (R. 164).

*It is conceded by the Administrator that there is no "integration between office and factory"—no connection with production—in the case of the remaining four (sales) offices in Class I:

Chase Brass & Copper Co.	12,155 sq. ft.
Blackington	980 " "
Thomas A. Edison, Export Division	2,500 " "
Tennessee Eastman	920 " "

(2)

Arkell Safety Bag Co. (2,510 sq. ft. [R. 183]) manufactures bags in Brooklyn and Chicago. The office herein is the sales office for the Eastern part of the United States. The salesmen "call on the customers and in most cases the orders are mailed in" (R. 183).

Teletype messages are sent from the office to Chicago and Brooklyn, but the secretary stated that the messages have to do with "complaints from customers for not receiving delivery in time" (R. 184).

Pressed as to whether instructions "concerning production" are given over the teletype, the witness testified that the teletype discussions "all relate to deliveries".

A traffic department sees to it that orders are "properly routed" (R. 187) and the office here takes care of purchasing and insurance for the company's properties (R. 187-189). Thus there is no direction of production.

(3)

United Feldspar Minerals Corp. (980 sq. ft. [R. 248]), a mining concern, houses* two officers of the corporation. But the one who testified stated that the office in New York is used for letter-writing purposes:

"Q. . . . What work do you do? A. . . . I run the corporation.

Q. You run it from that office? A. No. I run it when I go down to the plants entirely. I write letters there, yes" (R. 249).

* The Trial Judge in his opinion pointed out that executives and representatives of industry carry on "business activities in rooms at (the) hotels" and then said: "Would it not be quite as logical to say that the building maintenance employees of these hostelrys, as well as the plaintiffs in this action, are within the Act?" (R. 321).

(4)

Vanity Fair Mills (6,415 sq. ft. [R. 165]) is included in the table of "managerial offices". But its representative testified that:

"A. The New York office is a sales office and every person connected or employed by the New York office contributes to the sales function.

Q. Will you describe those functions? A. Waiting on customers; we take their orders; we have telephones which require telephone girls; we have an office boy, and we keep some of our records there" (R. 165-166).

Though the advertising manager has conferences with representatives of the company's advertising agency, the copy is written by the agency and not by the company's employees (R. 167).

The office does not buy raw materials for the company, though occasionally a buyer, while in New York, may just

"come to use our office as a convenience to hang his hat there, and that is about all" (R. 171).

(5)

Ames Bag Co. (300 sq. ft. [R. 228]) has a small office in the building which is used for sales of its wares and in connection with purchasing mill products. Both activities are carried on by telephone (R. 229). The company manufactures cotton bags in Cleveland (R. 228).

(6)

Perolin Company (1,990 sq. ft. [R. 209]) is described as "the sales department" of the company for the New England and Atlantic States (R. 209). The company deals with jobbers primarily (R. 209) and communication with them is maintained through the mailing of bulletins, approximately 15 times per year (R. 212).

(7)

Beechnut Packing Company occupies 2,690 sq. ft. (R. 97). Its advertising manager testified that the office at 10 East 40th Street is "merely an accommodation office" to make it convenient for the advertising manager to meet with publishers and representatives of radio stations located in New York City (R. 101-102).

Space in the office is reserved for the president, but he uses such office space only when he happens to be in New York, his headquarters being in Canajoharie, at one of the company's large manufacturing plants (R. 102-103).

(8)

Cherokee Spinning Company (770 sq. ft. [R. 137]). A full page of respondents' brief (pp. 19-20) is devoted to an attempt to show that this office is substantially devoted to designing the company's products.

The facts are that the function of this office is "to sell our merchandise" (R. 138). The only designing done there is the sketching of handkerchief designs (on paper) by the telephone operator

"when she is not too busy at the switchboard" (R. 142-143).

(9)

Domestic Concentrates. (200 sq. ft. [R. 153]) is engaged in two businesses. One is purely export* and the other is the manufacture of food flavors.

Upon the trial, counsel for respondents sought strenuously to show that instructions concerning production were sent from the office at 10 East 40th Street (R. 156-157). But the witness finally made it clear that he gave no

* The Circuit Court did not find that offices of export and import firms (Class 8) which occupy 3.7% of the building are engaged in production of goods for commerce (R. 341-343).

instructions "about the manufacture" (R. 157) and that the instructions had to do with informing the factory what had been sold, etc., and "had nothing to do with actual process of producing" (R. 158).

(10)

General Motors (Cleveland Diesel Engine) occupies 2,140 sq. ft. (R. 61) and its offices are devoted exclusively to "sales and service" (R. 62). Upon what basis it is claimed that this sales office of General Motors has anything to do with production it is difficult to understand.

(11)

Ediphone Division of Thomas A. Edison Company (2,300 sq. ft. [R. 112]). The Administrator erroneously states that we concede that this company belongs to this category (br. p. 56).

As a matter of fact this tenant is a sales and service office which sells and installs Ediphones (hearing instruments) in New York City only (R. 112, 116). Since no sales are made "to anybody outside of New York" (R. 114), not even the employees of this tenant who sell and install the Ediphones would be covered by the Act.

Summary

Thus of the manufacturing and mining company tenants (Class 1), eleven who do not have even a tenuous relationship with actual production, occupy a total of 21,395 sq. ft. Subtracting such area from 46,425 sq. ft., the total for the list of tenants on the Administrator's table of Class (I), "managerial tenants", leaves only 25,030 sq. ft. or 10.3% of 234,245 sq. ft., the total rentable area.

Since we agree with respondents (see (B) *infra*) that *Standard Magazines, Inc.* and *Eastman Kodak Company*, both of which appear on the Administrator's table of managerial offices, functionally belong among the tenants en-

gaged in publicity and editorial activities, and have included their space under our figures for publicity and editorial activities (pp. 12-13 *infra*), the space occupied by these two tenants, 5,700 sq. ft. and 4,450 sq. ft., respectively (R. 285, 69, 83), should be subtracted from the 25,030 (of allegedly "managerial" space), leaving a balance of only 14,880 sq. ft. or 6% * of the rentable area (234,245 sq. ft.), which may even remotely be considered to have some connection with production.

The question in this case is not whether an employee of a tenant is engaged in production but whether the production activities of the tenants collectively are so widespread and multifarious as to lead reasonably to the conclusion that the porter and the elevator man who serves the building is a producer.

The advertising manager of the Beechnut Packing Company established "an accommodation office" so that he could confer with agencies handling the company's advertising.

Can it be said that the elevator operator is engaged in the food manufacturing business because he is necessary to the advertising manager, whose activities in turn are necessary to the agency whose work helps sell the products of the factory in Canajoharie?

Can it be said that the porter who cleans the halls of this building has "a close tie" with the production of Ames Bags

* This 6% is occupied by 3 tenants.

Two of the three, Forbes Lithograph Company (New York and Philadelphia Divisions) and Cluett, Peabody, occupying, respectively, 3,360 sq. ft. and 10,010 sq. ft., will be discussed in the succeeding point.

S. S. White Dental Mfg. Co., which occupies 1,510 sq. ft., is really a sales office of metal shafting equipment. In view of the small space occupied by this tenant and the fact that drawings and designs are made for these metal shaftings in connection with such sales, we do not include this tenant among offices used purely for sales purposes.

because in an office 20 by 10 feet in area employees of the company make telephone calls, as a result of which materials are purchased for the factory in Cleveland?

Surely it bursts the bounds of common sense to call these maintenance workers producers of goods.

B

Only two of the manufacturing and mining tenants may functionally be classified with publicity and editorial offices

Despite the unreversed finding of the trial court that

" . . . the percentage of labor and space actually utilized in the building by employees of any of the tenants in connection with the publicity and advertising prepared in or outside of the building has not been mathematically computed, but in relation to the entire volume of business transacted and carried on by the tenants at and from said premises is not substantial" (R. 316),

respondents claim that more than 20% of the space of the building is utilized for publishing and advertising (see summary, br. p. 56) and have presented in Table II-a (p. 76) a list of manufacturing tenants which are classified as "advertising, publicity and editorial offices".

To accomplish their purpose respondents have resorted to the accentuation of minutiae.

(1)

Thus, the *Arkell Safety Bag Company* is listed in respondents' Table II-a (p. 76) among "advertising, publicity and editorial offices" though respondents' witnesses testified:

"We don't do very much advertising. We have a listing in one or two trade papers".

and that from time to time letters are sent to customers (R. 188). This office, as already demonstrated (p. 4, supra), is a sales office for the "Eastern part of the United States" (R. 183).

(2)

The *Perolin Company* is twice listed in respondents' Table II-a (p. 70) as an "advertising, publicity and editorial office" because approximately 15 times per year this sales office sends a bulletin to its customers to apprise them of wares on hand. Except for "one or two a year (prepared) to replace old ones", the same bulletins are used from year to year (R. 212).*

The company's representative described its office as "the sales department of the company" (R. 209).

(3)

Vanity Fair Mills is included in said list of "advertising, publicity and editorial offices" because one employee of this sales office confers with advertising agencies who handle advertising for the company (R. 167-169).

Respondents' own witness described the *Vanity Fair* office as a sales office and every person connected or employed by the New York office contributes to the sales function (see p. 5, supra).

(4)

Forbes Lithograph Manufacturing Company† is twice included in said list, although one of the two divisions, the New York division, is described as a sales division only where "no actual art work (is) done". It sells printing and lithography manufactured in Chelsea, Massachusetts (R. 57).

* The printing is done by an outside printer (R. 211).

† *Forbes Lithograph and Cluett, Peabody* are included in the 6% of "managerial" space (see p. 8 supra).

From respondents' description of the activities of this tenant—spread over four pages of its brief (pp. 11-14)—which occupies 3,360 sq. ft. in all [1.5% of the building (R. 56)], one would get the impression that its space is used as an art studio where tremendous quantities of commercial art are produced.

As related by the officer of this company, all the actual art work done in connection with the selling services of the "Philadelphia division" is confined to an area of "80 to 100" sq. ft. (R. 57).

The office was described "as the selling agent for the Forbes Lithograph Company. That is what it amounts to" (R. 40).

(5)

*Cluett, Peabody & Co.** is also twice listed among the "advertising, publicity and editorial offices". While it is true that advertising for Cluett, Peabody is handled from its office in the building herein, that activity represents only a fraction of its total activities and it is limited to conferences between Cluett's advertising representatives and the agencies and artists in the New York area which actually prepare the advertising (R. 239-241). Only five employees out of a total of 38 have anything to do with the advertising or publicity work (R. 237-243).*

What has been said about the Cluett, Peabody office applies equally to *Beechnut Packing Company*, which is likewise included in this list. The advertising manager testified that his department is in Canajoharie but that the 10 East 40th Street office was "merely an accommodation office" to make it convenient for him to meet with

* The offices of Cluett, Peabody contain a showroom where buyers from all over the country view the company's products (R. 237). Eight salesmen work out of the office. A market research department is maintained "for the benefit of the sales department" (R. 242). The president has his office in the building and there he confers with the various subordinate officers in charge of the various divisions of the company's activities (R. 238).

publishers and representatives of radio stations located in New York City (R. 101-102).

The sales manager of the food division and the salesmen working under him also use the office (R. 99-100) and the president has an office there which he uses when he is in New York, though his headquarters is in Canajoharie (R. 102-103).

Summary

There remains (of the manufacturing company tenants listed in respondents' Table II-a.) only *Eastman Kodak Company* [4,450 sq. ft.] which uses its space for publicity work and *Standard Magazines, Inc.** [5,700 sq. ft.] which does editorial work on magazines. Adding 10,600 sq. ft., the combined area of these offices to the 15,520 sq. ft. occupied by the group of publicity, editorial and trade organizations tenants listed in respondents' Table II (p. 75), the total space for this group would be 25,670 sq. ft., representing less than 11% of the total rentable area of the building.

We emphasize that the primary question is not whether the direct employees of these tenants are "necessary" to production of goods for commerce. In any event, the extreme of any claim that could be made on these figures is that possibly, if editorial and publicity work (11%) and management activities (6%) may be considered production, the tenants of not over 17% of the rentable area of the building have this tenuous tie to production.

We confidently argue that this cannot possibly be considered as a basis for holding that the elevator men and other workers employed by the owner of the building are really substantially engaged in the production of goods for commerce.

* This is the only "manufacturing" tenant referred to by the Circuit Court in its description of advertising and publicity tenants: "One publishing firm is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm" (R. 340).

Summary of the Building Occupancy

In view of what appears in the respondents' and the Administrator's amicus brief, it may be helpful at this point to present an over-all and complete "activities" picture of the multi-tenanted building involved in this case.

The building has a total rentable area of 234,245 sq. ft. It is occupied as follows:

TABLE OF OCCUPANCY

	No. of Tenants	Activities Carried on	Area	Per- centage of Total Area
I. Mfg. & Mining Tenants	20			
Chase Brass & Copper Co.			12,155	
Blackington			980	
Thomas A. Edison, Exp. Div.			2,500	
Tennessee Eastman			920	
J. H. Dunning Corp.			1,100	
Arkell Safety Bag Co.			2,510	
United Feldspar Minerals Corp.		Sales offices	980	
Vanity Fair Mills			6,415	
Ames Bag Co.			300	
Perolin Company			1,990	
Beechnut Packing Co.			2,690	
Cherokee Spinning Co.			770	
Domestic Concentrates			200	
General Motors			2,140	
Ediphone Division			2,300	
			37,950	16.2%*
Forbes Lithograph Co.		"Managerial"	3,360	
Cluett, Peabody & Co.			10,010	
S. S. White Dental Mfg. Co.			1,510	
			14,880	6%*
Standard Magazines, Inc.		Advertising, publicity	5,700	
Eastman Kodak Co.		and editorial	4,450	
			10,150	4.3%*

*These groups of tenants were held, by the Circuit Court, to be producers.

<i>Class</i>	<i>No. of Tenants</i>	<i>Activities Carried on</i>	<i>Area</i>	<i>Per- centage of Total Area</i>
II. Sales Agencies	17	Selling		9.3%
III. Lawyers	24	Practice law		13.6%
IV. U. S. Employment Service		Employment		13.6%
V. Advertising, publicity & trade organizations	10	Advertising, etc.		6.6%
VI. Engineering & construc- tion	7	Engineering		8.9%
VII. Private investments	5	Financing		4.7%
VIII. Import and export	5	Executive offices		3.7%
IX. Miscellaneous	22	(no interstate commerce)		3.3%
Vacant space				11.0%

* These groups of tenants were held, by the Circuit Court, to be producers.

Conclusion

Obviously there is here no conflict of evidence. There is a difference of opinion between the District Court and the Circuit Court of Appeals in interpreting the evidence to decide whether these elevator men in a city office building are engaged in the production of goods.

Our main brief demonstrates that the Circuit Court of Appeals reached its conclusion on the basis of open, avowed and expressed dissent from the reasoning of this Court and of six other circuits.

We join with the Administrator in asking this court to apply practical judgment to the problem. Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority.

McLeod v. Threlkeld, 319 U. S. 491. There was left a large area for local regulation by the States, and nobody dreamed that Congress intended to say that an elevator man in a multi-tenanted office building is engaged in the production of goods for commerce on any such tenuous or extreme distortion of perspective as characterizes the briefs both of the respondents and of the Administrator.

These maintenance workers, admittedly, every one, got a bigger wage than the minimum to which he would have been entitled—plus overtime at time and one-half—if the owner of the building had followed the schedules of the Wage and Hour Law instead of a different schedule which yielded these men an even larger wage.

We ground our claim for reversal on the reasoning of this court in *Kirschbaum v. Walling*, 316 U. S. 517, and *Western Union Tel. Co. v. Lenroot*, U. S. , 89 L. Ed. 289.

In the *Kirschbaum* case this court held that to be included as a producer an employee must have a close and immediate tie with the process of production for commerce and those having "only the most tenuous relation to" the production of goods are not covered by the Act.

What this court said in the *Western Union* case respecting the definition of the word "handling" makes it clear that the Circuit Court was wholly in error in holding that those who sell goods are "handlers" of goods and, therefore, included as producers within the meaning of the Act.

To accept the arguments advanced by the respondent and the Administrator in this case is to abandon that "common sense accommodation of judgment" suggested by this court in the *Kirschbaum* case and to reach for the first time—six years after the law's enactment—the fantastic conclusion that maintenance employees of substantially every office building in the United States are covered by the Fair Labor Standards Act. If Congress had meant

that it could easily have said it. (Cf. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607.)

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH M. PROSKAUER,
Counsel for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1944

No. **820**

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, et al.,

Respondents.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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of Counsel.

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10 EAST 40TH STREET BUILDING, INC.,
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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below.

The opinion of the District Court for the Southern District of New York dismissing the complaint after trial without a jury is reported in 51 F. Supp. 528 (R. 345-356). The unanimous opinion of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment of the trial court is not yet officially reported but appears unofficially in 7 Wage Hour Rept. 1208, 8 Labor Cases, par. 62,445 (R. 381-386).

Jurisdiction.

The judgment of the United States District Court for the Southern District of New York dismissing the complaint upon the merits was rendered June 3, 1943 (R. 372). The decision of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment below was

handed down December 12, 1944 (R. 381). The Court modified the first two sentences in its opinion slightly on December 21, 1944 (R. 386). The Circuit Court issued and filed its order for a mandate to the District Court on December 27, 1944 (R. 386-387), and subsequently granted a 30-day stay for petitioner to make application for writ of certiorari.

Jurisdiction has been invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Pet. for Writ, pp. 9, 15-16).

Questions Presented.

Petitioner's statement of the questions presented is somewhat argumentative and conclusory in form with the result that it does not fairly state the issues upon which certiorari is sought (Pet. for Writ, pp. 9-10).

Concisely put, the question presented is whether, under the facts of this case, plaintiffs were "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act and entitled to its benefits.

Statement.

In view of petitioner's default in presentation of a statement of the case, respondents present the following brief summary statement:

Defendant, the owner of a 48-story and basement building at 10 East 40th Street, New York City, employed plaintiffs as building maintenance employees to maintain and operate various services and facilities for the use and benefit of all of the tenants in the building (R. 346, 340-341). Included among the tenants at all times were executive and sales offices of 20 manufacturing and mining companies, occupying 25.8% of the gross rentable area or 29% of the occupied space; offices of sales agents for 17 manufacturing

and mining concerns occupying 9.3% of the gross rentable area or 10.4% of the occupied space; offices of 10 advertising agents, publicity firms and trade organizations occupying 6.6% of the gross rentable area or 7.4% of the occupied space; offices of a number of export and import concerns, engineering and construction firms, the United States Employment Service and various investment, finance, credit and similar businesses (R. 346-347).

The manufacturing and mining companies used the rented space for executive and administrative direction of the manufacture and distribution of goods across state lines, from factories and mines throughout the United States, including performance of such functions and processes as the making of designs, purchasing of raw materials, taking of specifications for goods to be produced to order, planning and guidance of the productive processes, selling, advertising and other activities integrally related to the production of goods for and the marketing of goods in interstate commerce (R. 25-70, 70-72, 72-78, 78-94, 109-115, 126-131, 140-144, 154-170, 170-175, 180-183, 183-191, 195-200, 203-210, 214-217, 217-219, 222-224, 231-236, 252-253, 258-269, 273-277, 314-319). The advertising agents and publicity and trade organizations, as well as 7 of the manufacturers, used the rented space for designing, preparation and work upon commercial art designs, advertising copy, photographic prints, publicity releases, magazine manuscripts and proofs and similar articles subsequently distributed across state lines, both from the building and, after reproduction, from printing and lithographing plants elsewhere (R. 25-70, 78-84, 94-109, 109-115, 116-122, 151-154, 183-191, 203-210, 211-214, 224-227, 231-236, 258-269, 269-272, 287-290, 314-319, 322-326, 348). The sales agents of manufacturing and mining concerns used the rented space to take orders and forward them to factories and mines located in various states for shipment of goods to various parts

of the country; as a result of their efforts, substantial amounts of merchandise of substantial value were shipped across state lines from various factories, mines and warehouses (R. 122-125, 131-140, 224-227, 236-238, 254-258, 278-282, 319-321, 331-332, 348).

In the operation of its office building defendant employed an average of 50 to 60 maintenance workers, including elevator starters, elevator operators, window cleaners, watchmen, porters, mechanics, handymen and painters (R. 350; Pl. Ex. 1, 342-344). These employees performed such customary duties in connection with the maintenance and operation of the building as the furnishing of heat and hot water; the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as office furniture and equipment; to and from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks (Pl. Ex. 1, R. 340-341). All of the tenants in the building regularly and continuously had the benefit of and made use of these various facilities (Pl. Ex. 1, R. 341, 351).

The building elevators were used regularly to carry advertising matter, publicity releases, photographic materials, magazine lay-outs, commercial art work, printers' and lithographers' proofs, Diesel engine parts, Ediphone machines and parts, samples of merchandise for which orders were taken in the building, and office supplies (R. 37, 39, 46, 48, 70, 80, 95, 96, 97, 98, 105, 106, 111, 134, 266, 289, 340; Pl. Ex. 5). Salesmen, buyers, free lance artists, ad-

vertising copy writers, customers, messengers and executives, as well as employees who earned their daily bread in the building, made regular use of the elevators, to transact their business or go to or from their work (R. 42, 44, 111, 130, 135, 185, 186, 189, 262, 265, 350).

Statutory Provisions Involved.

The relevant statutory provisions are Sections 3 (b), 3 (j), 7 (a) and 16 (b) of the Fair Labor Standards Act of 1938 which have been set out in full in petitioner's brief (Pet. for Writ, pp. 16-17).

ARGUMENT

I.

The case at bar involved additional facts not present in *Borella v. Borden*, in which certiorari was granted January 2, 1945, and the conclusion of the Circuit Court here based upon such added facts was not inconsistent with any decision of this Court or of the various Circuit Courts of Appeals.

Petitioner in referring to the decision in the Second Circuit in the case at bar has characterized the building in which plaintiffs worked as a typical office building, or a multi-tenanted office building, and urged that prior decisions in the various Circuit Courts conflict with the result here. But this would ignore the fact that the test is not the general character of the building or the nature of the employer's business, but the particular activities conducted there to which the building service employees' functions immediately relate. Compare *Kirschbaum v. Walling*, 316 U. S. 517; *Jacksonville Paper Co. v. Walling*, 317 U. S. 564; *Warren Bradshaw Drilling Co. v. Hall*, 317 U. S. 88. The

result must thus depend not upon any general principle but upon the facts of the individual case.

Examination of the record and petition for certiorari in *Borella v. Borden*, No. 688, certiorari granted January 2, 1945, indicates that the latter was decided upon the basis of the character of the executive and administrative work carried on in the building there involved by the Borden Company. In the case at bar, on the other hand, there was involved, in addition to manufacturers' executive and administrative work, regular and continuous activity upon the part of some 10 advertising agents, publicity firms and trade organizations, together with 7 of the manufacturing tenants, in the preparation, designing and other productive work directly in the building upon commercial art concepts, textile designs, advertising copy, photographic prints, publicity releases, magazine manuscripts and proofs and similar articles.

There can be little question that the various tenants preparing textile designs, taking and developing and printing photographs, working upon advertising copy and publicity releases, editing and laying out magazines and publications, collating and correcting manuscripts and printers' proofs, depicting commercial art conceptions and similar activities, were working upon goods in the formative stages of production. "Such items are unquestionably 'subjects or articles of commerce'". *Western Union Telegraph Co. v. Lenroot*, U. S. , decided Jan. , 1945. In each case, further, there was produced in the building, by a necessary process which was the initial step in a series of operations culminating in the production of finished goods for interstate distribution, a "part or ingredient" of such goods. See Section 3 (i) of the Act. Such creative items were not only intended to be, but actually were, regularly shipped across state lines, both in process of preparation and as finally reproduced. Those engaged in

their preparation were producing "for commerce" within the meaning of the Act. *U. S. v. Darby Lumber Co.*, 312 U. S. 100, 117-118.

Employees performing "the first step" in a series of operations ultimately culminating in articles that move into commerce have frequently been held to be "engaged in the production of goods for commerce"; and this is true even where the only commodities moving out-of-state are end-products after further processing or handling elsewhere. See *Walling v. Peoples Packing Co.*, 132 F. (2d) 236, 240 (C. C. A. 10); *Bracey v. Luray Iron & Metal Co.*, 138 F. (2d) 8 (C. C. A. 4); *David v. Goodman Lumber Co.*, 133 F. (2d) 52 (C. C. A. 4); *Enterprise Box Co. v. Fleming*, 125 F. (2d) 897 (C. C. A. 5). See also *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, indicating that the concept of "production" carries back to the initial stages.

It is hardly subject to dispute that the creative and coordinating functions of editing, art work and advertising in connection with preparing materials for publication and subsequent distribution across state lines is "the production of goods for commerce" within the meaning of the Act. See *Walling v. Sun Publishing Co.*, 140 F. (2d) 445 (C. C. A. 6). To hold otherwise would be to nullify the effect of this Court's recent construction of the comprehensive definition of "goods" in the Act. Compare *Western Union Telegraph Company v. Lenroot*.

Under the circumstances, there was present in the case at bar a substantial showing of facts sufficient to justify the Circuit Court's conclusion that the various tenants in the 10 East 40th Street building were engaged directly in the building in the production of goods for interstate commerce within the meaning of the Act. It follows that the Second Circuit's conclusion that plaintiff's work was necessary to that production was proper

for a reason entirely independent of and without regard to the doctrine of *Borella v. Borden*, 145 F. (2d) 63. See *Kirschbaum v. Walling*, 316 U. S. 517. This conclusion was in accord with the weight of the evidence and not in conflict with the decisions of the various Circuit Courts of Appeals to which petitioner has referred. Facts such as these were not present in any of the other cases.

II.

In any event the decision of the Second Circuit was not in conflict with the decisions of the various Circuit Courts of Appeals relied on by petitioner.

Petitioner has rested its application for certiorari principally upon the assumed conflict between the decision of the Second Circuit in the case at bar and the decisions of some six other Circuit Courts of Appeals, citing also the New York Court of Appeals. These, according to petitioner (Pet. for Writ, pp. 10-11 and Brief in Support, pp. 19-21), "have uniformly held that maintenance employees in office buildings are not covered by the Act". The fact is that almost without exception all of these decisions were based entirely upon the determination that building service employees are not "engaged in commerce" where tenants in the buildings serviced are so engaged, following the rationale of this Court in *McLeod v. Threlkeld*, 319 U. S. 491. In the various appellate decisions relied on by petitioner the court in the course of the opinion usually made clear that there was no contention that the employees in question were engaged in occupations necessary to "production of goods for commerce", nor did the holding reach so far. In the one or two cases where reference was made to the question of "production", the court bottomed its decision upon the insubstantial character of the evidence

as to the activities of the tenants in question or the considerable number of tenants renting space as executive offices in connection with manufacturing or mining conducted at plants elsewhere.

The readiest proof of this fact lies in the words of the courts themselves.

1. *Johnson v. Dallas Downtown Development Co.*, 132 F. (2d) 287 (C. C. A. 5):

Many of appellee's tenants were engaged in intrastate commerce, but a substantial number of them were engaged, wholly or in part, in some type of interstate business or "in commerce" within the meaning of the Act. None of such tenants nor other persons were engaged in the production of goods of any kind or character in or about the building. None of appellee's tenants were engaged in the production of goods elsewhere, but some of them were agents for concerns so engaged—not in or about the building but generally outside of Texas.

2. *Stoike v. First National Bank of N. Y.*, 290 N. Y. 195 (Ct. App. N. Y.):

It (defendant) contends, however, and the Appellate Division has recognized that this " . . . is not a case where the employee was in anywise engaged in the production of goods for commerce" (264 App. Div. 585, 586). Accordingly, the defendant's argument goes to the narrow question whether the plaintiff, at the time of his overtime employment, was "engaged in" interstate commerce within the intended meaning of Section 7 (subd. a) of the Act.

We are not unmindful that in *Kirschbaum v. Walling* (*supra*), the provisions of Section 7 (subd. a), with respect to "the production of goods for commerce," have—because of the liberal definition of the phrase "production of goods" (Sec. 3 [j])—been given a broad construction. But that case, as

we view it, is not controlling here where the plaintiff does not claim we are dealing with a problem involving "the production of goods for commerce."

3. *Tate v. Empire Bldg. Corp.*, 2 Wage Hour Cases 472 (W. D. Tenn.), aff'd per curiam 135 F. (2d) 743 (C. C. A. 6):

The interstate activities of the tenants before me in the present case are at best borderline activities if the suing employees were employees of the tenants, and moreover the tenants in the entire office building whose business is claimed to bring their employees within the coverage of the Act number five, an inconsiderable percentage of the whole.

4. *Johnson v. Masonic Bldg. Co.*, 138 F. (2d) 817 (C. C. A. 5):

A few of the offices are used for executive offices of companies engaged in interstate business. Thus there were three railroad ticket agencies; and *Merry Bros. Brick and Tile Company* produces brick and tile for interstate shipment at its plant elsewhere in Augusta, and *Southeastern Bituminous Company* produces goods for commerce in a nearby plant.

As the record stands after settlement thereof by the district judge, there is no evidence that any goods are produced for commerce in the building itself. The building employees are not doing anything that is necessary to or even directly contributes to such production. * * * If the office men of *Merry Bros. Brick and Tile Company* and *Southeastern Bituminous Company* can be said to be producers of goods, the appellants, employed by another employer with no especial reference to the business of any tenant, cannot be held to be so engaged because these tenants were producing goods elsewhere.

* * * We adhere to the decision in *Johnson v. Dallas Downtown Devel. Co.*, 132 F. (2d) 287.

5. *Rucker v. First National Bank of Miami, Okla.*, 138 F. (2d) 699 (C. C. A. 10):

But the facts before us which bear upon the phrase "production of goods for commerce" are only remotely analogous to the facts in the *Kirschbaum* case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. In any event, the relationship is not shown to be "close and immediate." Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce.

6. *Rosenberg v. Semeria, et al.*, 137 F. (2d) 742 (C. C. A. 9):

Here, as there, the employees concerned are not in any sense engaged in production nor are their activities integrated with the production of goods. Cf. *Kirschbaum Co. v. Walling*, 316 U. S. 517. The sole argument made on their behalf is that they are "engaged in commerce."

7. *Convey v. Omaha National Bank*, 140 F. (2d) 640 (C. C. A. 8):

Plaintiff, appellant here, does not claim that he and the other employees on whose behalf this suit was filed were engaged in production for interstate commerce.

With but little dissent the decisions of other courts are in accord with our conclusion that appellant and the other building service employees here involved are not covered by the Act when employed in servicing a building in which no production for interstate commerce is carried on.

The clear distinction of the above decisions, indicating no conflict with the doctrine of *Borella v. Borden*, was not brought to this Court's attention in the brief in opposition to the petition for certiorari in the latter case.

Since it would appear that there is no essential conflict between the decisions of the various Circuits and the decision of the Second Circuit in the case at bar, founded upon a different doctrine, the petition for a writ should be denied.

III.

The employer having stipulated and the trial court having found that the work of the employees here was carried on for the benefit of the various tenants in the building to enable the latter "to conduct their activities conveniently and efficiently", and there being no dispute that the tenants in the building were substantially engaged there in interstate commerce, it follows that the employees were closely enough related to the activities of the tenants as to be likewise engaged in commerce.

There is a further and independent reason why certiorari should be denied in the case at bar. The defendant does not dispute that a substantial number of tenants, occupying a substantial portion of the rentable area of the building, was there regularly and continuously engaged in business activities constituting interstate commerce within the Act's definition in Section 3 (b). The Second Circuit,

following the decisions of other circuits referred to above, and adopting the rationale of *McLeod v. Threlkeld*, 319 U. S. 491, nevertheless has concluded that plaintiffs were not "engaged in commerce" (R. 386).

But there was in the case at bar a factor sufficient to permit distinction between the state of the record in this case and the various cases which, at first blush, would seem to present substantial authority for a holding adverse to the employees upon this point. It was stipulated here that in all of their activities, as carried on in the 10 East 40th Street building, the "tenants regularly and continuously had the benefit of and made use of the facilities" supplied by the building service employees, including heat and hot water, elevator service, electric lighting and various other facilities essential to the maintenance of clean, safe and habitable working quarters (Pl. Ex. 1, R. 341). And the trial court further found that "the labor of defendant's building service employees has been performed . . . to enable the various tenants to conduct their activities conveniently and efficiently" and the tenants "regularly and continuously had use of and derived the intended benefit from the various facilities so provided" (Finding 11, R. 351). In this state of the record the plaintiffs thus made out a *prima facie* case establishing that their employment was sufficiently closely related to the activities of the various tenants in commerce as to be deemed an essential part of commerce itself as carried on by the tenants and to entitle them to the benefits of the Act. *Overstreet v. North Shore Development Co.*, 318 U. S. 125; *Slover v. Wathen*, 140 F. (2d) 258 (C. C. A. 4); *Walling v. Sondock*, 132 F. (2d) 77.

Under the circumstances, the difficulty presented by the difference in language of the definition of "commerce" in Section 3 (b) as compared with the definition of "production" in Section 3 (j) was here obviated and the Second

Circuit could properly have rested its determination upon a ground free from conflict with the result in *McLeod v. Threlkeld* and the various Circuit Court decisions referred to above.

IV.

There is here presented no novel, substantial or important question of construction of a federal statute not heretofore determined by this Court, nor is the decision of the Second Circuit in conflict with applicable decisions of this Court or of the other circuits.

CONCLUSION.

No adequate reason is set forth in the petition for the granting of a writ of certiorari and application therefor should be denied.

Respectfully submitted,

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APR 2 1945

CHARLES ELMORE BROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED
BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN,
ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY,
JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN,
LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI,
BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY,
THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO,
SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI,
AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS,
SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE,
MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK,
HERBERT B. MCCLELLAND, THOMAS ROSSO, GAETANO
GRECK, JOHN L. ORTIZ, GILBERT ORTIZ, PASQUALE A.
SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE
OROSZ, SALVADORE SANCHEZ, ROBERT MURDEN, JOHN P.
SMYTH, FRED KASSAB, JOSEPH CEFAL, JOSEPH HERRERA,
EMIL J. CISEK and CHARLES G. BORG, suing in behalf of
themselves and all other employees and former em-
ployees of defendants similarly situated,

Respondents.

BRIEF FOR RESPONDENTS

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AARON BENENSON,
Counsel for Respondents.

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(29 U. S. C. § 201, *et seq.*) :

Section 2	2, 3, 35
Section 3(b)	3, 67
Section 3(j)	3, 47, 50, 59
Section 3(i)	3, 4, 59, 60
Section 7	3, 4, 5
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MISCELLANEOUS:

H. R. 7200, 75th Cong., 1st Sess., Sec. 2(a) (24), May 24, 1937	50
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Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. McCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAL, JOSEPH HERRERA, EMIL J. CISEK and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

BRIEF FOR RESPONDENTS

Opinions Below.

This is an action by 51 building service employees of defendant 10 East 40th Street Building, Inc. for unpaid overtime compensation and liquidated damages under Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Pub. 718, 75th Cong. 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*). The opinion of the District Court for the Southern District of New York dismissing

the complaint after trial without a jury is reported in 51 F. Supp. 528. The opinion incorporates findings and conclusions (R. 312-321). The unanimous opinion of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment of the trial court, is reported in 146 F. (2d) 438 (R. 339-343).

Statement of Jurisdiction.

The judgment of the United States District Court for the Southern District of New York dismissing the complaint upon the merits was rendered June 3, 1943 (R. 333). The decision of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment below was handed down December 12, 1944 (R. 339). The Court modified the first two sentences in its opinion slightly on December 21, 1944 (R. 344). The Circuit Court issued and filed its order for a mandate to the District Court on December 27, 1944 (R. 344), and subsequently granted a 30-day stay for petitioner to make application for writ of certiorari. Certiorari was granted February 12, 1945 (R. 346).

Jurisdiction has been invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Pet. Br. p. 2).

Statutory Provisions Involved.

In Section 2 of the Act, Congress stated its findings and declaration of policy. Congress found in Section 2 (a) "that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers

of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

Section 2 (b) declares the policy of the Act to be "through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries."

Section 7 of the Act provides that no employer shall "employ any of his employees who is engaged in commerce or in the production of goods for commerce" for a work week longer than 44 hours during the first year of the Act unless such employee receives compensation for his employment in excess of such hours "at a rate not less than one and one-half times the regular rate at which he is employed." On October 24, 1938 the statutory work week was reduced to 42 hours, and since October 24, 1940 it has been 40 hours.

Section 3 (b) defines "commerce" to include "trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof."

Section 3 (j) defines "produced" as "produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Section 3 (i) defines "goods" to mean "goods" . . .

wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof * * *"

Section 16 (b), upon which this action is founded, provides that employees who have been employed in excess of the Act's standard hours without receiving the indicated additional compensation for overtime in accordance with Section 7 of the Act may sue to recover the unpaid overtime compensation, an additional equal amount as liquidated damages, a reasonable attorney's fee and costs of the action, in any court of competent jurisdiction.

Statement of the Case.

A. The Pleadings and Admissions.

The complaint alleged that during the period after the Act became effective space was leased by the defendant owner in its 40-odd story building to over 100 tenants, including a substantial number of manufacturing companies, manufacturers' sales agents, trade associations, distributors and exporters (R. 4-5); that the manufacturing companies and concerns were engaged at factories and plants in various states of the United States in producing for interstate commerce and distributing in interstate and foreign commerce substantial quantities of various goods (R. 5-6); that the offices of the manufacturing companies and sales agents of such companies occupying space in the building were tenanted by employees engaged in performing various functions and activities constituting a necessary and essential part of the manufacturing and production of such goods for interstate commerce, in placing orders and in executing contracts for the purchase of various raw materials and for the sale of various finished products for shipment in interstate commerce, in gathering advertising and publicity information and materials and distributing

such information and materials in interstate commerce, and similar activities (R. 6-7).

The complaint also averred that space in the building was leased to a substantial number of tenants who there engaged in the preparation of and other work upon magazines and publications, blueprints, plans, designs, drawings and specifications for use in engineering and industrial work, advertising and publicity materials, copy, lay-outs, photographs and displays, radio scripts, photographic prints, trade association reports, bulletins and statistical tables, printer's and lithographer's materials, purchase and sale orders, telegraph messages, shipping documents and other goods, substantial quantities of which were, subsequent to the work performed upon them in the building, distributed in interstate commerce to points in various states of the United States (R. 7-8).

These tenants and others admittedly made regular and continuous use of the mails, telephone and telegraph in preparing and disseminating messages between their offices in the building and various points outside the State of New York (R. 9; 309).

The complaint further stated that the various plaintiffs were employed during the period subsequent to October 24, 1938, when the Act went into effect, as elevator operators, watchmen, porters, mechanics and handymen and in similar capacities, in performing the usual and customary duties of persons charged with effective maintenance and operation of such a building (R. 9), and that in performing their duties the employees were engaged in interstate commerce and in the production of goods for interstate commerce within the meaning of the Act (R. 9-10). Finally, the complaint alleged that the various employees were employed, during the period subsequent to October 24, 1938, for hours in excess of the maximum standard prevailing under Section 7 of the Act, and the defendant failed and

refused to compensate them for the excess hours at rates not less than one and one-half times the regular rates at which they were employed, contrary to the Act's overtime provisions (R. 10).

The answer admitted that defendant's employees at all times performed the customary duties of persons charged with effective maintenance and operation of such buildings, including various enumerated activities (R. 12). It was not disputed that the employees were employed for hours in excess of the Act's standards without receiving time and one-half for overtime (R. 12). Finally, the answer made certain concessions regarding the general character of the tenancy of the building, including the fact that 27% of the space was leased to 20 manufacturing companies "for executive and sales offices", and 10% to 7 advertising and photographic studio concerns (R. 13). The parties agreed by stipulation upon the amount which each plaintiff must recover if entitled as a matter of law to succeed as an employee "engaged in commerce or production for commerce" (R. 308; 310-312). Certain other material facts, also stipulated prior to trial, are best considered together with the evidence, of which they constitute a part (Pl. Ex. 1, R. 307-309).

Upon the trial plaintiffs examined some 55 witnesses, all tenants in the building, with a view to developing the facts with respect to the area of the occupancy and the character of the business of each tenant (R. 312). Defendant called no witnesses but rested upon its motion to dismiss on the law (R. 306).

B. Summary of the Facts.

1. Nature of Defendant's Business.

During the period covered by the complaint defendant was the owner of the 48-story and basement 10 East

40th Street building in New York City and defendant's business consisted of the management and operation of the building and rental of space in the building to various tenants (findings 2-3, R. 313). In connection with the operation of the building defendant employed plaintiffs as maintenance employees (finding 4, R. 313). These employees furnished and maintained various services and facilities for the use and benefit of all of the tenants in the building, including heat and hot water, elevator service, fire sprinkler protection and electric lighting, and performed various other duties essential to the maintenance of clean, safe and habitable working quarters (Pl. Ex. 1, R. 308-309).

2. Activities of the Various Tenants.

The gross area available for rental in the 10 East 40th Street building was 234,425 square feet (finding 5, R. 313). Space was rented to 111 tenants, occupying 89% of the gross rentable area, the remaining 11% of the space being vacant (findings 5-6, R. 313).

Included among the tenants at all times were the following (finding 6, R. 313-314):

(1) Executive and sales offices of 20 manufacturing and mining companies occupying 25.8% of the gross rentable area or 29.0% of the occupied space in the building.

(2) Offices of sales agents for 17 manufacturing and mining concerns occupying 9.3% of the gross rentable area or 10.4% of the occupied space in the building.

(3) Offices of 5 export and import concerns occupying 3.7% of the gross rentable area or 4.2% of the occupied space in the building.

(4) Offices of 10 advertising agents, publicity firms and trade organizations occupying 6.6% of the

gross rentable area or 7.4% of the occupied space in the building.

(5) Offices of 7 engineering and construction firms, occupying 8.9% of the gross rentable area or 9.9% of the occupied space in the building.

(6) Offices of 5 tenants engaged in investment, finance, credit and similar businesses occupying 4.1% of the gross rentable area or 4.7% of the occupied space in the building.

(7) An office of the United States Employment Service, an agency of the United States Government affiliated with the War Manpower Commission, occupying 13.6% of the gross rentable area or 15.3% of the occupied space in the building.*

Plaintiffs do not seek to predicate their right to recover upon the activities of two additional classes of tenancies:

(a) Offices of 24 lawyers or law firms, occupying 13.6% of the gross rentable area or 15.3% of the occupied space in the building.

(b) Offices of 22 tenants engaged in miscellaneous businesses not interstate in character, occupying 3.3% of the gross rentable area or 3.8% of the occupied space in the building.

The trial court found that the services rendered and the work done in the defendant's office building by the officers, agents and employees of the tenants encompassed the following (finding 7, R. 314-315):

(1) Manufacturing and mining companies use their offices for executive and administrative activities, for conferences, and for taking orders for sub-

* The finding referred to percentages of "rented area" (R. 313). The parties have stipulated to correct this to indicate that the percentages are of "rentable area" (R. 334). Adjustment to show percentages of occupied space is mathematical, based on the 11% average of vacancies (finding 5, R. 313). The Circuit Court accepted the correction and stated occupancy in terms of both rented and rentable area (R. 342-343).

stantial quantities of merchandise of substantial value produced and shipped from their factories and mines elsewhere located to customers in various states. Seven of these companies also carry on advertising or publicity work in their offices.

(2) Sales agencies of manufacturing and mining concerns use the offices in the building to sell a variety of the products of the companies they represent. Orders are taken and are forwarded by mail, telephone, teletype or other means of communication to factories and mines located in various states for shipment of goods to various parts of the country. As a result of the efforts of these agencies, substantial amounts of merchandise of substantial value are shipped across state lines from factories, mines and warehouses.

(3) The United States Employment Service places white collar workers in various factories and business houses. Practically all the registrants served by this agency are located in the State of New York, and about 96% of the placements are within the State of New York, about 2% resulting from referrals from out-of-state branches of the U. S. E. S. in other cities through a nationwide job clearance system.

(4) The advertising agents carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm receives stories for fiction magazines which are sold all over the country. These magazines are printed off the premises and are delivered by the printers to an outside firm which distributes them. The work in the building includes the purchase and receipt of scripts, the examination and correction of such scripts and the regular business and financial activities of the firm. The officers and employees of the trade organizations are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere

printed and are in most cases distributed from places other than the building; some are distributed directly from the building.

(5) Engineering and construction firms carry on their correspondence and executive and administrative activities, including financing, collection work and estimating on and submission of bids. In some cases the officers, agents and employees of these tenants prepare plans and sketches in the building for construction projects located in various parts of the United States and in foreign countries.

(6) Investment, financing and credit organizations use their offices in the building herein for their executive and administrative work, conferences, correspondence, keeping of records, arranging for loans, and reports. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

(7) Import and export concerns make arrangements for export and import of a variety of goods of substantial value. The goods are stored at and shipped from places other than the building.

Since "interstate commerce is not a technical legal conception but a practical one, drawn from the course of business" [HOLMES, J. in *Swift & Co. v. United States*, 196 U. S. 375, 395] and "the true perspective is to be drawn from the whole picture" [*United States v. General Motors Corp.*, 121 F. (2d) 376 (C. C. A. 7), cert. den. 314 U. S. 618], determination of whether the Fair Labor Standards Act applies to these plaintiffs depends upon full consideration of the activities of the tenants in the building to which their services related. The character of the work performed at 10 East 40th Street by a number of the principal tenants as indicated by the testimony is therefore set forth here in some detail.

Manufacturing and Mining Companies

Forbes Lithograph Manufacturing Company, occupying space on two different floors, produces lithographed materials and rotogravure printed materials in its plant at Chelsea, Mass. (R. 18-19, 40). Two of the six sales offices of this company covering the United States are located in the building (R. 19, 46). The selling area of one includes New York, New Jersey and Connecticut and that of the other extends exclusively to customers outside of the State of New York (R. 24, 40). Orders are solicited from out-of-state customers by mail, telephone and direct customer contact from the offices in the building (R. 24, 40), and forwarded to the Chelsea plant together with make-up and shipping instructions (R. 41, 50). Customers include Coca Cola, DuPont, Hercules Powder and Saturday Evening Post (R. 24, 28). The total annual volume of sales attributable to the efforts of one of these offices alone is approximately \$2,000,000 per year and an additional substantial amount is accounted for by the other office (R. 51-52, 54); this represents nearly one-half of a total annual nationwide business of the company approaching \$5,000,000 (R. 54). All of this volume represents materials produced to order (R. 40) including posters, window and counter displays, booklets, folders, wrappers, cartons, labels, calendars and other advertising and packaging materials involving lithographing or rotogravure printing work (R. 31, 35, 41, 45, 46, Pl. Ex. 3).

One of the offices of *Forbes Lithograph* is in charge of a sales manager and director of the company (R. 22). It houses the chief artist of the company who characterizes himself as the "creator of the art work" (R. 20-22) incorporated in the finished printed and lithographed materials turned out at Chelsea, Mass. (R. 24-26). He supervises some seven or eight artists on the payroll at the Chelsea plant and several others employed in one of the offices

maintained by the company in the building (R. 20, 42). His work includes assisting and advising customers and prospective customers with respect to preparation of art work and accompanying legends ultimately incorporated into the company's finished products (R. 21, 23-26, 35-36). When a customer such as the Coca Cola Company requires a lithographed advertising device, for example, a fountain festoon, it is up to the chief artist "to create a piece of art work that will carry the message," to "develop the idea" (R. 24-25). The chief artist deals constantly with freelance artists who call at his office in the building in connection with projects upon which they are working involving orders or accounts of *Forbes Lithograph* customers (R. 21-23). He drafts sketches for their guidance to indicate the manner of carrying out his creative ideas (R. 22, 27-28). Similarly, from time to time, as orders or projects require, he calls for the services of and consults with freelance copy writers (R. 21, 36-37). He freely criticizes the work of the artists and writers; occasionally the artists may retouch their work while in the office at 10 East 40th Street to conform to his suggestions or corrections (R. 28, 35). From time to time likewise he assists with the wording of the legend to be incorporated in the finished printed or lithographed material turned out by the Chelsea plant (R. 23, 35-37).

The other office of *Forbes Lithograph Manufacturing Company* in the building is headed by a vice-president and director of the company in charge of sales and in charge of one of its manufacturing divisions (R. 39, 52). Naturally, he consults from time to time with the chief artist, in connection with art work for various current orders and related matters (R. 47). His staff includes several artists engaged in the building in performing original art work, including the conception of ideas, depiction of designs, lettering of legends, setting up of original dis-

plays and other work upon master materials before they are sent to Chelsea, Mass. for reproduction (R. 42-43, 54). These artists "are kept busy the entire year" in the work of creating and translating into the art medium the ideas which culminate in *Forbes Lithograph* products distributed to customers throughout the United States (R. 40-41, 43, 55). Art designs not entirely created in the office in the building but originated elsewhere may also be touched up by these artists prior to lithographing (R. 60). Paintings and lay-outs ready for reproduction are inspected, varnished, wrapped and shipped from the 10 East 40th Street building to Chelsea, Mass. (R. 38). Lay-out instructions and similar details necessary to the ultimate manufacture of the particular piece are prepared in the building and transmitted to Chelsea (R. 38). Sample proofs are sent from Chelsea to 10 East 40th Street, examined and marked for correction there, and returned to Chelsea by mail or express, preparatory to turning out the finished product (R. 30-31). The work varies in size from small creations capable of clipping to the back of an order, in which case proofs are placed in manila wrappers, to conceptions of a large size requiring crating for shipment from the building (R. 31, 41). The chief artist "demands to see proofs" of anything he creates; from time to time he also returns proofs to customers with corrections suggested or requested (R. 30-31). If draft art-work requires correction he may make the change himself (R. 35).

Long distance telephone and a teletype connection are in regular daily use "to get and give information"; to check upon the progress of goods in process at the Chelsea plant; to discuss with the plant personnel changes in outline, size, color or shading; to confer and advise with respect to speeding deliveries in the interest of prompt and efficient customer service; to advise the plant that art work, lay-outs or proofs are on route and that certain

make-ready preparations should be begun in connection with the production of particular orders (R. 50-52). The nature of the lithograph process is such that the art work performed at 10 East 40th Street is identically reproduced, through the photographic medium "as near as can be physically done" in each item of finished product turned out in the plant at Chelsea, Mass. (R. 38, 46, Pl. Ex. 3). Work done in connection with the Coca Cola account alone would thus be reproduced in more than 100,000 pieces of material yearly (R. 33). Gum wrappers designed in the building (R. 55) and distributed to customers directly from Chelsea probably exceed 200,000,000 per year.* All of these items are distributed through various states (R. 43, 53).

Integration of the art and sales work at 10 East 40th Street with the plant turning out the finished product in Chelsea involves continuous communication by telephone, teletype and mail (R. 49-52). In this connection, the vice-president in charge of the New York divisional office also frequently travels back and forth to advise and assist both with respect to plant production problems and with regard to sales problems arising in his territory (R. 52-53). He was originally a production man and endeavors to control from his New York office the operation of an important production department in the Massachusetts plant supplying goods to customers all over the country (R. 52-53).

Eastman Kodak Company occupies space on two floors for the use of photographers and copy writers in furtherance of advertising and publicity campaigns involving the products of the company and its various subsidiaries (R. 69) and the uses to which those products may be put by other manufacturers (R. 75-76). In one suite there is the

* Average gross yearly sale of gum wrappers by the New York divisional office of Forbes Lithograph Manufacturing Company is 250,000 pounds (R. 45); there is a minimum average of 800 wrappers to the pound (R. 45); 800 x 250,000 equals 200,000,000.

usual paraphernalia of photographic studios; including lighting equipment, numerous commercial cameras, developing rooms, with the necessary chemicals, all admittedly utilized to "produce photographs" (R. 70-71). The sets for the photographs are staged, the pictures are taken, the films are developed and the prints are made in the 10 East 40th Street building (R. 70-71). Between 100 and 200 prints are turned out weekly (R. 71). Finished prints are delivered from the photographic studios to the publicity office on a different floor; from time to time the photographers go back and forth between floors to confer with the copy writers (R. 70-71).

A staff of eight copy writers prepares stories and captions to be coordinated with photographs produced in the studios and sends out releases, prints and other publicity materials to newspapers and magazines all over the country by mail (R. 74-78). Most of the releases incorporate photographs taken in the studios in the building and all of the accompanying copy is written in the building (R. 77). During a typical period covering several months early in 1941, 15 photographs and captions prepared at 10 East 40th Street by *Eastman Kodak's* staff were published in various issues of newspapers throughout the United States having a combined circulation in excess of 20,000,000 (R. 81-82, Pl. Ex. 10). One photograph reproduced in about six newspapers, for example, reached about 1,200,000 readers in various states (R. 81, Pl. Ex. 10). These examples represent but a small part of all of the pictures and publicity copy produced in the building which enter into newspaper circulation all over the United States, the majority of it outside the State of New York (R. 81-82).

Beechnut Packing Company which manufactures food products and confections for interstate commerce at three plants in the State of New York rents space for advertising

and executive offices (R. 96, 97, 99). An advertising manager who makes his headquarters at 10 East 40th Street determines general policy of the company with respect to all of its advertising and originates campaigns to popularize the various products of the company (R. 97). He considers his job "creative"; while the actual copy is written by outside advertising agencies, it is based upon his ideas (R. 97). All of the *Beechnut Packing* copy involving programs formulated upon a nationwide basis with the use of a variety of advertising media must be approved by the advertising manager at 10 East 40th Street (R. 98). Representatives of the agencies with which he deals call at his office to submit material; he confers with and advises them constantly; in connection with his supervision of the company's advertising programs, from time to time he corrects or changes the copy submitted (R. 99). The advertising matter which he originates, or which he supervises in preparation, goes to newspapers and publications throughout the United States in very substantial quantities (R. 102). Beechnut sales approximate \$36,000,000 a year.*

10 East 40th Street also contains the executive office of the president of the *Beechnut Packing Company*, who is in constant communication with the main office at Canajoharie, by direct wire with relation to company problems (R. 99). A teletype machine is also maintained in the building to facilitate regular communication with the plant (R. 102). One of the company's divisional sales managers is likewise housed there (R. 99).

Perolin Company of New York, manufacturing chemists with a plant in Chicago, where products are produced for delivery all over the United States, has a sales and advertising office in the building covering a number of states in New England and along the Atlantic coast (R. 209, 212). Products are sold from stock at Chicago or from stock in a warehouse in Brooklyn (R. 209-210). The annual volume

* Moody's *Industrials* (1944), quoting 1943 figures.

of sales is approximately \$125,000 (R. 210). Orders and shipping instructions are prepared and regularly forwarded to Chicago from 10 East 40th Street; there is constant communication by mail, telephone and telegraph with the plant (R. 210). The duties of the office staff in the building include preparation of sales estimates to enable the factory to anticipate and maintain a level of production sufficient to insure a stock which will supply accumulating orders (R. 210-211). Copy is also prepared at 10 East 40th Street for circulars and bulletins publicizing the company's products which are sent out from the building to customers in various states to the extent of some 40,000 pieces per year (R. 211, 213).

Cleveland Diesel Engine Division of the *General Motors Company* maintains a sales office in the 10 East 40th Street building and stores there a stock of spare parts for Diesel engines (R. 61). Parts ordered and received from the factory in Cleveland, Ohio, have been stored, sold and shipped directly from the building, 50% of the deliveries being to customers in other states (R. 61-63). Service engineers, whose headquarters are at 10 East 40th Street, are also engaged in adjusting and "trouble shooting" in connection with Diesel engines in operation (R. 63). Sales of such engines to customers, both within and without the State of New York, by the staff in the building, are substantial in amount (R. 306-307).

Tennessee Eastman Corporation, a subsidiary of the *Eastman Kodak Company* (R. 72, 75, 79), manufactures chemicals and plastic products at Kingsport, Tenn. (R. 63) and maintains in the building a sales office covering the States of Connecticut, New Jersey and Pennsylvania, as well as New York (R. 64). There is constant communication by mail, telephone and teletype with the Kingsport, Tenn. plant, to which orders taken in New York are forwarded (R. 64, 66). Sales are by telephone and mail and

also upon personal visit of purchasers to the 10 East 40th Street office (R. 66). Merchandise is all made to order at the Tennessee plant (R. 66). Sales for delivery from Kingsport to customers in various states approximate \$1,000,000 per year (R. 68).

The building also houses the *Ediphone Division* of the *Thomas A. Edison Co. Inc.*, which has a factory at West Orange, New Jersey, from which Ediphone machines are ordered and delivered by the company's truck for sale in the metropolitan area (R. 112-113). Requisitions for machines are prepared and forwarded from the building to the West Orange factory which fills them to the extent of about 250 machines monthly and "hundreds of thousands" of spare parts are also ordered and received from New Jersey (R. 113). The sale value of machines ordered from the company's New Jersey plant is about \$645,000 per year,* to which must be added about \$15,000 worth of parts annually (R. 114). From time to time upon customer's request Ediphone machines are brought to 10 East 40th Street, where they are specially packed for shipment to an office of the customer in another part of the United States (R. 114). Machines examined or received for repair on the premises are occasionally returned to the West Orange, N. J., factory for scrapping (R. 112, 115). There is regular and continuous communication with West Orange by three or four direct wire telephone connections; and a messenger goes back and forth daily between the factory and the New York office (R. 115). The company's own delivery truck delivers requisitioned Ediphones and parts directly to the premises in the 10 East 40th Street building, bringing them up in the building elevator three times weekly (R. 115-116).

In addition, the *Export Division* of *Thomas A. Edison Co. Inc.* sells through its 10 East 40th Street office between

* 250 machines a month (R. 113), \$215 average sale value per machine (R. 114); $250 \times 12 \times \$215$ equals \$645,000.

\$500,000 and \$1,000,000 worth of Edison products per year for export, including such goods as batteries, spark plugs and Ediphone equipment (R. 124, 127). All goods sold involve special manufacture pursuant to the order taken for export (R. 125, 127). The *Thomas-A. Edison Co.* export office at 10 East 40th Street prepares orders and forwards them to the factory at West Orange, N. J.; makes traffic arrangements with steamship and railroad companies; prepares shipping documents and bills of lading in connection with all shipments; arranges delivery of goods to steamship docks by Edison truck from the West Orange, N. J. plant; consults daily with the production staff at West Orange (R. 125-127). The Export Division has a branch office in London and maintains regular and constant communication with this branch and with its distributor outlets all over the world by mail, cable and frequent travel (R. 126-127). There are two direct wire telephone connections between the 10 East 40th Street office and the West Orange plant (R. 126).

—*Cherokee Spinning Company* of Knoxville, Tenn., has an office in the building where over \$1,000,000 of cotton goods are sold annually for delivery across state lines from Knoxville to customers, a substantial number of which are outside of the States of New York and Tennessee (R. 138-142). Goods sold "have to be made up specifically to the order" (R. 143). There is no other sales office of the company (R. 140). Work performed at 10 East 40th Street by *Cherokee Spinning Company* employees also includes the designing by "stylists" or designers of handkerchiefs and handkerchief borders or strips in full color (R. 142-143, 149); handkerchiefs are made up at the Knoxville, Tenn., mill based upon designs executed at and forwarded from the office in the building (R. 144, 151). Sometimes designs are made up pursuant to orders received and on other occasions sample designs are exhibited to customers

and orders are taken for goods to be made up at the Tennessee plant from designs selected by the customer from the samples (R. 144-145). Execution of orders at Knoxville pursuant to designs made up at 10 E. 40th Street is a frequent occurrence (R. 151). Installed in the office of this company is a teletype machine used from time to time to transmit instructions with respect to execution of textile designs to the out-of-state mill and to answer inquiries from the mill regarding the carrying out of the designs (R. 145-146). Complete instructions for mill make-up are incorporated in the original design sheet as prepared at 10 E. 40th Street and transmitted to the mill (R. 146; Pl. Ex. 22); the specifications prepared for mill use include, in addition to the pattern, indication of type of yarns to be employed, weaving directions, color combinations to be utilized and the general warp and weft arrangement (Pl. Ex. 22).

Another tenant, *J. H. Dunning Corp.*, is a manufacturer of wooden boxes and box shooks and also markets sawdust and other by-products of considerable value (R. 161-162). The company has plants in N. Windham, Me., Biddeford, Me., Decatur, Ala., Richmond, Va., and San Francisco, Cal.; deliveries are made from all of these plants, pursuant to orders forwarded from 10 East 40th Street, to customers all over the United States (R. 162). Gross sales between November 1, 1938 and June 1, 1942 were about \$1,500,000, or slightly less than \$500,000 per year (R. 163). The various plants of *J. H. Dunning Corp.* in four states are "in constant contact" with the president, who maintains his office in the building in New York City; in carrying out production policies "they do not blow a whistle without his approval or sanction" (R. 163). He indicates the orders to be worked on, the general scheme of plant operations and similar matters related to production (R. 164). Continuous communication is maintained by teletype from

the office at 10 East 40th Street directly to the various plants outside the State of New York; in the *Dunning* enterprise "everybody takes his orders from 10 East 40th Street" (R. 164).

Vanity Fair Mills, Inc. occupies an entire floor in the building (R. 165). The company manufactures women's hosiery and underwear at plants in Reading, Pa., Monroeville, Ala., Jackson, Ala., and New Holland, Pa. (R. 165). Sales are made by telephone and personal contact with customers calling at 10 East 40th Street, and orders transmitted to the plants of the company result in interstate shipments to purchasers throughout the United States (R. 166-167). Sales are by sample; sometimes orders are filled from stock maintained at one of the plants, and sometimes the goods must be made up after the order has been placed (R. 166). *Vanity Fair* also has at 10 East 40th Street the offices of its advertising manager, who confers there with representatives of outside advertising agencies and who places the company's advertising upon a nationwide scale in such consultations (R. 167). Outside agencies submit sketches, designs and lay-outs to the advertising manager, who from time to time makes corrections or suggestions with regard to such lay-outs (R. 168). Occasionally executives from the company's plants visit the sales office in the building, where they make their headquarters while in New York City for such activities as conferences and arranging the purchase of materials for delivery to the company's plants in various states (R. 169-170). A forecast of sales is formulated as part of the function of the sales department at 10 East 40th Street; goods are produced at the factories in coordination with anticipated requirements indicated by the plotting of accumulating orders (R. 170).

Space rented to the *S. S. White Dental Manufacturing Company's Industrial Division* houses sales engineers en-

gaged in marketing and taking orders for flexible shafting for use in engines and similar engine devices (R. 175-176).

The devices are produced at a plant in Staten Island, N. Y., but the sales area covered by the 10 East 40th Street office includes the entire United States (R. 176-177). The gross value of sales in the building between November 1, 1938 and June 1, 1942 was \$3,500,000, or an average volume of about \$1,000,000 per year (R. 177, 179); about 75% of sales are for delivery to customers outside the State of New York (R. 180). All goods are produced to order from designs as received at the factory; the flexible shafting is not carried in stock (R. 179). The sales engineers who take the orders at 10 East 40th Street make up a design and accompanying instructions appropriate to the customers' desired use of flexible shafting; the design contains accurate specifications followed by the factory in producing the shafting to fill the order (R. 177, 179). Goods made up at the plant from these designs are shipped all over the United States (R. 177). Communication by teletype is maintained directly with the plant; from time to time an engineer at the plant may be called upon to assist sales engineers at 10 East 40th Street in preparing designs pursuant to which shafting is to be produced (R. 177).

Arkell Safety Bag Co. produces bags, used as linings for boxes, containers and cartons for packaging various products, in plants in Brooklyn, N. Y., and Chicago, Ill. (R. 183). The company's executive offices and a sales office covering the entire eastern part of the United States are located at 10 East 40th Street (R. 183). Orders are taken and forwarded to the plants for delivery across state lines in very substantial quantities (R. 183, 187). Sales through the 10 East 40th Street office exceed \$500,00 annually (R. 187). A traffic department in the 10 East 40th Street office arranges the routing of shipments from the Brooklyn plant to fill interstate orders (R. 187). Orders taken by *Arkell*

Safety Bag Co. salesmen on the road are mailed to the 10 East 40th Street office, where executives determine whether the orders are to be filled by production at the Brooklyn plant or the Chicago plant (R. 184). About 95% of the entire production of the company is made to order to meet customer's specifications (R. 188). The president and vice-president of the company have offices at 10 East 40th Street, where general management policies in connection with the company's affairs are determined; finances are arranged in connection with the production and distribution of goods for both plants (R. 185-187); contracts are negotiated in connection with the production and distribution across state lines to the Brooklyn and Chicago plants and equipment for the factories is similarly purchased and insurance placed (R. 188-189). Direct mail advertising to customers and prospective customers all over the United States is also handled from the office in the building; circulars are made up in connection with this work using a mimeograph machine there (R. 188). A teletype connection is used to communicate messages to the Chicago plant, to expedite deliveries (R. 184).

Chase Brass & Copper Co. occupies four floors as headquarters for the sale of brass and copper lighting and plumbing fixtures, containers and closures and other items manufactured at its Waterbury, Conn. plant (R. 196). The territory covered by the 10 East 40th Street sales office includes the entire United States (R. 198); average annual volume of sales orders placed there, all filled subsequently from the Waterbury, Conn. plant, is close to \$1,000,000 (R. 197). All these products "when manufactured are then shipped to customers outside of the state where they are manufactured" (R. 196).

Cluett Peabody & Company, the well-known men's apparel manufacturer, rents one entire floor in the building and a substantial portion of another (R. 234). The com-

pany produces neckwear, underwear, collars, handkerchiefs and shirts at plants in Troy, N. Y., Corinth, N. Y., Leominster, Mass., Waterford, N. Y., and Atlanta, Ga. (R. 234). Both merchandising and advertising departments, a designing staff and a sales department of a neckwear selling subsidiary, center at 10 East 40th Street (R. 235-236). The merchandising department purchases the raw materials used in the production of the various lines at the company's five plants, involving a total annual business of approximately \$35,000,000 per year (R. 235, 239). These extensive purchases are for shipment from Southern or New England cotton mills directly to the *Chuet Peabody* plants in various states (R. 235). A designing staff at the office in the building sketches and originates patterns to be made up at the *Chuet Peabody* mills; executives at 10 East 40th Street decide what patterns are to be utilized; weaving instructions are prepared and transmitted to the mill with each selected design (R. 235, Pl. Ex. 25). Specifications in the instruction sheet accompanying the designs, as prepared at 10 East 40th Street, include width of cloth, total yardage, pattern, with color layout, and warp arrangement, including number, type and color of yarns, number of threads to be woven and similar data; cloth made up at the *Chuet Peabody* plants conforms exactly to such designs and instructions (R. 235-236, Pl. Ex. 25).

A *Chuet Peabody* subsidiary with a showroom in the building is charged with the sale of neckwear (R. 236). Orders are taken by salesmen on the road, transmitted to the office at 10 East 40th Street and from there forwarded to the factory at Troy; buyers call to see the line; orders are received by telephone, telegraph and mail from customers throughout the United States (R. 236-237). There is continuous communication between the building and the various salesmen on the road all over the country, relating to their sales efforts (R. 237). Sales of neckwear made

through the 10 East 40th Street office, pursuant to which substantial quantities of merchandise are shipped in interstate commerce, approximate \$1,000,000 per year (R. 238).

From his executive office at 10 East 40th Street the president of *Cluett Peabody & Company* "guides the destiny of the company" (R. 238). The vice-president in charge of production at all the plants is in regular communication by telephone with the New York City office and makes weekly trips to 10 East 40th Street to confer there on production matters with the president (R. 238, 243). The president works similarly at 10 East 40th Street with other officials in charge of merchandising, market research, advertising and other departments of the company who are stationed there and is generally engaged in "setting up the policies of the company" (R. 238). The building also houses the staffs of an advertising department, display department, and a publicity department of *Cluett Peabody*, as well as the vice-president in charge of all of these activities (R. 239-242). The advertising department at 10 East 40th Street guides the work of outside agencies preparing advertisements for magazines; prepares brochures and pamphlets for publicity purposes; gets up market research reports for the aid of the sales department; writes advertising copy for college newspapers (R. 239-240, 241, 243). Press releases written in the building are sent to newspapers all over the country (R. 241). Outside artists call to confer relative to art material in process with the advertising manager, and from time to time corrections are made in proposed lay-outs on the premises before the work is approved (R. 240). Proofs are also received from the printer or lithographer, corrected in the building and returned ready for publication (R. 240). A display department originates and creates displays and booklets distributed by *Cluett Peabody* to outlets for its products all over the United States (R. 240, 244); the

volume of material of this nature sent out to customers in various states from 10 East 40th Street might approach 30,000 to 50,000 pieces per year (R. 240-241).

Three smaller companies occupying space in the building for sales and executive and administrative offices, include a producer of cotton bags with a plant in Cleveland, Ohio (R. 228); a manufacturer of fine silverware at Attleboro, Massachusetts (R. 193) and a firm producing food flavors and extracts in a New York City plant (R. 154-155).^{*} These three concerns take orders from customers all over the United States by mail, telephone and salesman contact, for delivery across state lines (R. 193-194, 229, 156). The aggregate sales accredited to their 10 East 40th Street offices are about \$200,000 per year (R. 154-155, 194, 228). Continuous communication is maintained between the offices of these tenants and their respective plants by mail and telephone. Long-distance telephone and a teletype are frequently used by one company to maintain communication with various Southern cotton mills in effecting purchase of raw materials for shipment to its Cleveland plant, valued at about \$140,000 per year (R. 228-229). The food concentrate concern houses at 10 East 40th Street the person in charge of its plant production, who carries on by telephone from the building the work of "instructions to the factory with relationship to production", including such matters as shipping instructions (R. 156-157).

Space in the building is also leased to a mining company, United Feldspar Minerals Corp., which produces feldspar, mica, flint, quartz and other minerals for shipment to customers in various states from its mines in North Carolina and Maine (R. 248-250), and maintains regular communication by use of the mail, telephone and telegraph with its customers as well as with the mines outside the state, from 10 East 40th Street, including cor-

^{*}Ames Bag Machine Co.; Blackinton & Co.; Domestic Concentrates, Inc.

responsibility with respect to "everything in connection with the operation of the plants" (R. 249, 251). The president and executive vice-president are housed there; they "run the corporation" (R. 248-249). There is some selling performed (R. 250). The executives decide what priorities to follow in working on orders at the plants (R. 250).

Finally, the greater part of a floor in the building is leased and occupied by *Standard Magazines, Inc.*, publisher of some 60 different magazines (R. 285, Pl. Ex. 27). At 10 East 40th Street is the company's main office where a numerous editorial staff interviews authors and artists, purchases stories and art work, reads articles and material submitted, performs editorial revision and prepares layouts of the copy, examines galley proofs and corrects and returns proofs to the printer ready for the press run (R. 286-289). The executives of the company allocate the work to four printing plants in New York, New Jersey, Illinois and Connecticut (R. 286). Between 32,000,000 and 35,000,000 copies of its magazines are distributed each year to news stands throughout the country; of which approximately 25,000,000 copies are sold annually (R. 287-288). The value of the product edited and prepared at 10 East 40th Street is at least \$2,500,000 annually.* Paper for the printing of the 60 *Standard Magazines* publications is purchased pursuant to orders or requisitions placed by mail and telephone from the 10 East 40th Street office. Pursuant to these orders shipments are made from paper mills outside the State of New York to the printing plants in New Jersey, Connecticut, Illinois and New York (R. 287-289). Business, sales and executive departments also function at 10 East 40th Street (R. 286, 289).

* Most of the magazines in the Standard Magazines group retail at ten cents per copy (Pl. Ex. 27).

Advertising, Publicity and Trade Publication Organizations.

Offices at 10 East 40th Street are also occupied by one of the country's largest publicity organizations and by a number of smaller advertising representatives and trade organizations. Together with these must be considered the advertising, publicity and editorial work carried on in the building by Forbes Lithograph Manufacturing Company, Eastman Kodak Company, Standard Magazines, Inc., Cluett Peabody & Company and other tenants whose activities have already been outlined above.*

Carl Byoir & Associates, and the affiliated *Business Organizations, Inc.*, occupy one entire floor and portions of two others (R. 83, 303). The firm represents, as public relations counsel, such manufacturers as Aluminum Company of America, Libby-Owens Company, Pullman Company, Willys-Overland, Marshall Field & Co. (R. 85, 90-91). The affiliated organization handles the Atlantic & Pacific Tea Company account exclusively (95). The office at 10 East 40th Street is the hub of the firm's operations; there are substantial branch offices in Washington, D. C. and Chicago, Ill. and local offices in Toledo, Ohio, Detroit, Mich., and Los Angeles, Cal. (R. 90). The office at 10 East 40th Street is the central point for mail or telephone clearance of all publicity material originating at the other offices, prior to release; the work of the entire organization is "all controlled and centered in New York" (R. 90). In connection with the operation of *Carl Byoir & Associates* there is regular and continuous correspondence and telegraphic and telephonic communication between 10 East 40th Street and the branch offices, representatives in the field and clients in various states (R. 90-91). Officials of the publicity firm travel back and forth across state lines frequently to visit headquarters of clients and their own branch offices; and personnel from the other offices fre-

* See references, pages 11-17, 21, 23, 25, 27 above.

quently visits the office in the building on business (R. 91). The 10 East 40th Street office is the "controlling organization" for the entire enterprise (R. 91).

The *Carl Byoir* offices employ over twenty "feature writers" and copy writers to prepare publicity material, radio scripts, magazine articles and advertising displays and exhibits of various sorts (R. 89, 91, 94). Releases prepared by this staff total 15,000 to 20,000 sheets weekly, all run off by mimeograph at 10 East 40th Street and subsequently sent out to newspapers and publications throughout the United States (R. 84-85, 92-93); 90% of the material is sent to addressees or consignees outside of the State of New York (R. 85). Copy prepared at 10 East 40th Street appears "verbatim" in newspapers throughout the country with a vast combined circulation; the total number of newspapers on the mailing lists of the organization is close to 17,000; the number of these papers to which any single release may be sent varies, of course, with the nature, purpose and content of the release (R. 92). *Carl Byoir's* mail department alone includes seven persons, engaged in operating the mimeograph machines, collating, stapling and folding releases, operating wrapping, sealing, stamping and addressing machines, and transporting the releases to the post office (R. 84-85). The average number of pieces of mail handled per week by this department is between 2,500 and 3,000 (R. 84-86). Occasionally, releases to be sent to 1,000 or more newspapers are, after being mimeographed by the mailing staff, bundled together to be sent, with accompanying mailing lists, to an outside mailing house for addressing and stamping (R. 84).

Carl Byoir & Associates' activities also include the work of a photographic department, which has a studio in the building, including all equipment and paraphernalia "necessary to photograph and develop" such as commer-

cial cameras, Kleig lights, developing rooms and similar facilities (R. 93). An average of 200 prints a week produced and developed on the premises are sent out to newspapers all over the United States (R. 93). Frequently packages of pictures and releases are sent to the firm's branch offices in Chicago and Washington by mail or express for distribution through those offices; bulk shipments to the Chicago office are a weekly occurrence; packages are sometimes of such large size that they cannot be carried by hand to the post office and must be called for by the express company (R. 86). A single mail shipment may run to 500 separate pieces and occasionally, entire sacks of mail are taken directly to the post office from the building (R. 86). All of this material goes out of 10 East 40th Street constantly via the building elevators (R. 94) and much of it subsequently appears in hundreds of newspapers and publications throughout the length and breadth of United States, from metropolitan dailies like the New York Times, New York Herald Tribune, Los Angeles Herald and Los Angeles Evening News, to small-town papers as picturesquely named as the Kettle Falls (Wis.) Sun, Yemassee (S. C.) Democrat, Hominy (Okla.) News, Worley (Ida.) Go-Getter (R. 87, Pl. Ex. 12).

The work of *Carl Byoir & Associates'* staff also includes preparation of scripts for radio broadcasts which are subsequently recorded on master waxes at a recording studio; the master record is then returned to 10 East 40th Street for approval and sent from there to the record plant where copies are struck from it and mailed out to approximately 100 or 150 radio stations in various parts of the country; there the scripts prepared at 10 East 40th Street are broadcast over the air waves (R. 94-95, Pl. Ex. 14).

Three of the smaller tenants are engaged in work upon advertising copy, designs and art work (R. 103, 134, 203).*

* George E. Hatch, Willis L. Towne, John F. Yewell.

One places industrial and technical advertising and direct mail advertising and does catalogue work, all of the customers being manufacturing companies, with plants in various states where they produce goods for interstate commerce (R. 104-105). Copy is written on the premises for both technical advertising and direct mail advertising and arrangements are made with printing and engraving shops for reproduction of the material; galley proofs received from the printer are corrected and returned, ready for the run-off (R. 103-106). Direct mail matter is sent out all over the United States (R. 105-106, 108); a substantial part of the technical advertising appears in publications in different parts of the country (R. 108).

Another tenant, engaged in similar work, prepares copy and originates ideas for advertising at 10 East 40th Street which subsequently appears in approximately 100 technical publications throughout the United States with a circulation interstate in character (R. 134-137, Pl. Ex. 21). An architectural artist, occupying a small office, receives blueprints from various architects, magazines and advertising agencies and executes pictures upon architectural subjects, such as reproductions of buildings or drawings or paintings of proposed construction projects; about 50 such drawings are executed a year at 10 East 40th Street some of which are reproduced in magazines of national circulation, such as the Ladies Home Journal and others of which are mailed or shipped by express to architects in various parts of the United States (R. 202-205).

The 10 East 40th Street building also houses several organizations issuing trade publications, including an association of distillers, with membership all over the United States (R. 245-246); an organization furnishing information and advice to stockholders and investors in various states (R. 260-262); a textile research institute with a nationwide membership of textile mills and chemical con-

cerns (R. 190); and a market research and statistical organization in the textile field, furnishing information and statistics to the country's leading rayon producers (R. 292). All of these tenants publish magazines, copy for which is prepared and edited at 10 East 40th Street.

Allied Liquor Industries engages in public relations work, national in scope, including a research department which collects and disseminates information of interest to its membership regarding pending legislation, both in Congress and in various state legislatures (R. 245); releases prepared at 10 East 40th Street are sent out to various newspapers (R. 246-247). The organization's publication is a weekly magazine, with a circulation of 450 covering members and others throughout the country; the editorial work is done at 10 East 40th Street (R. 247).

American Investors Union publishes and circulates a 50-page monthly publication (Pl. Ex. 26) to 3,600 investors, 3,100 located outside of the State of New York, and also gathers and disseminates information and advice of interest to its membership and conducts a regular and continuous correspondence with them in an endeavor to answer their questions regarding investments and investment trusts (R. 262-263). Although the magazine is not printed in the building, the copy is fully prepared there and edited there and the publication is received from the printer and wrapped, addressed and mailed out at 10 East 40th Street (R. 262).

Textile Research Institute uses its office to maintain a regular correspondence with mills throughout the United States involving research and consultation upon textile production problems (R. 190-191). A monthly magazine (Pl. Ex. 23) is edited at 10 East 40th Street, where material is gathered, some of it from research staffs maintained by the Institute in St. Louis and Washington, and rewritten, original material is prepared, and the whole arranged for

publication; from time to time publication instructions are sent to the printer in Lancaster, Pa., who mails out 700 copies of each issue to subscribers, libraries and educational institutions all over the country. (R. 190-192).

Textile Economics Bureau, Inc., a statistical organization, publishes "*Rayon Organon*" (Pl. Ex. 28), a technical magazine with a circulation of 5,000 per month, at least 60% of which is outside of the State of New York; drafts, charts and statistical tables; edits and prepares material and lay-outs for the press "just as you do for a newspaper," at 10 East 40th Street (R. 293-294). Together with a related organization, *Textile Surveys*, there is also performed statistical work for the rayon industry, including special reports, statistical tables and charts, data for which is gathered and disseminated from the building to approximately 200 mills in various states (R. 294-296, Pl. Ex. 29). Regular correspondence is maintained with Du Pont, Celanese, American Viscose Corp. and other leading rayon producers in collecting market data for statistical reports (R. 294-295).

3. Work of the Various Employees.

In the operation of its office building defendant employed an average of 50 to 60 maintenance workers, including elevator starters, elevator operators, window cleaners, watchmen, porters, mechanics, handymen and painters (finding 9, R. 316; Pl. Ex. 1, R. 310-312). These employees performed such customary duties in connection with the maintenance and operation of the building as the furnishing of heat and hot water; the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as office furniture and equipment, to

and from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks (Pl. Ex. 1, par. 6, R. 308-309). All of the tenants in the building regularly and continuously had the benefit of and made use of these various facilities (Pl. Ex. 1, par. 7, R. 309; finding 11, R. 317).

The building elevators were used regularly to carry advertising matter, publicity releases, photographic materials, magazine lay-outs, commercial art work, printers' and lithographers' proofs, Diesel engine parts, Ediphone machines and parts, samples of merchandise for which orders were taken in the building, and office supplies (finding 10, R. 316; R. 30-31, 38, 41-43, 70-71, 74-78, 84-86, 92-94, 103-106, 112-117, 134-137, 144-146, 151, 168, 177-179, 188, 190-192, 202-205, 235-236, 239-244, 262-263, 286-289, 61-63). Salesmen, buyers, authors, free-lance artists, advertising copy-writers, customers, messengers and executives, as well as employees who earned their daily bread in the building, made regular use of the elevators, to transact their business or go to or from their work (finding 10, R. 316; R. 21, 28, 35-37, 70-71, 74-78, 91, 99, 115, 167, 169-170, 236-237, 240, 286-289).

Although most of the tenants occupied less than a full floor, there were several whose operations required more space. Chase Brass & Copper Company leased four floors; Carl Byoir & Associates had one full floor and parts of two others; Cluett, Peabody & Company occupied space on two separate floors, one of which it entirely leased. Both Eastman Kodak Company and Forbes Lithograph Manufacturing Company rented space on floors in widely separated parts of the building; their employees and ex-

ecutives made frequent use of the elevators to go from one department to another carrying with them advertising and publicity copy, photographic materials and commercial art work in course of preparation (finding 10, R. 316; R. 39, 70).

The absolute dependence of the various tenants in this 48-story building upon the work of the building service employees is self-evident. The ordering, producing and interstate marketing of vast quantities of goods of an aggregate annual value of at least \$15,000,000* in transactions negotiated in the building would be interrupted if the elevators ceased to run. In an unheated building the productive processes of commercial art creation, textile design and magazine publication, such as are carried on by Forbes Lithograph Manufacturing Company, Cluett, Peabody & Company and Standard Magazines, Inc. as a closely integrated part of their manufacturing enterprises, could not be carried on in cold weather. Were the water system not kept in repair the various employees, engaged in the offices of the tenants in preparation of advertising materials and sales orders to be forwarded across state lines would be deprived of the customary sanitary facilities without which they obviously could not work. Channels for the orderly and efficient interstate distribution of goods from numerous factories, plants and mines in nineteen states** to customers all over the United States and abroad would be disrupted were the building facilities not maintained. [Compare Section 2 (a) of the Act.]

* The total sales for interstate delivery from out-of-state factories, mines and mills to customers throughout the United States and abroad negotiated through offices in the building approximate \$15,000,000 annually. See references, pages 11, 17-20, 22-27 above, and footnote at page 62.

** New York, Massachusetts, Illinois, Ohio, Tennessee, New Jersey, Maine, Alabama, Virginia, California, Pennsylvania, Connecticut, North Carolina, Georgia, West Virginia, Florida, Washington, Oregon and New Hampshire.

Question Presented.

The sole question upon this appeal is whether the building service and maintenance employees of the 10 East 40th Street building, upon the foregoing facts, were "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Summary of Argument.

The case at bar was tried upon the theory that respondents were employees engaged in functions "necessary" to "production of goods for commerce" within the meaning of the Act. The pleadings, testimony and exhibits were directed toward this end and this was the principal legal question for determination. On this appeal respondents likewise place their main reliance upon this contention. They urge further, however, that they are also engaged in work so closely related to the regular and continuous conduct by tenants in the building they served of activities in interstate commerce as to be an essential part thereof.

Upon the question of "production of goods for commerce" respondents' argument takes the following form:

1. The test for application of the Act is the duties of the employees and the activities to which they relate, not the general nature of the building, or the employer's business.
2. The tenants in manufacturing enterprises were engaged both in sales and also in executive and administrative work, as an integral part of their productive operations.
3. Despite division of manufacturing, storage, sale, distribution, machine repair and executive direction among different buildings and employers, maintenance workers are necessary to production.

4. Geographical dispersion of the various components of productive enterprise to acquire economic advantage does not remove maintenance employees from intimate relationship to the essential elements producing goods for commerce.

5. Tenants preparing designs, photographic publicity releases, advertising copy, magazine layouts, performed an initial productive step on parts or ingredients of publications intended for interstate distribution.

6. The courts have uniformly recognized that production carries back to the initial stages and have held maintenance workers no closer to ultimate physical distribution of goods in commerce than were respondents here to be necessary to such production.

7. In any event, textile designs, photographs, publicity releases, advertising matter, publication layouts and proofs, commercial art work, were goods produced for commerce in the building.

8. Selling, whether by manufacturers' own forces or by sales agencies, is an essential function in productive enterprises and economically a part of production, particularly where sales are to specification.

9. Authorities relied on by petitioner based contrary conclusions upon doctrine of commerce, not production, and inadequate factual showing; the facts here are adequate and the appropriate test less exacting.

10. The trial court having found respondents' duties were performed to enable the various tenants to conduct their activities conveniently and efficiently and that the tenants regularly had use of the fa-

cilities provided and derived the intended benefit, respondents were clearly necessary to production of goods for commerce by the tenants.

Upon the question of engagement "in commerce" respondents, recognizing the adoption by this Court of the rationale of *McLeod v. Thelkeld*, 319 U. S. 491, nevertheless urge that the doctrine in that case does not extend without further consideration to all employees performing functions which may further the conduct of interstate commerce, but that each case must be determined upon its own facts. Respondents further point to the effect of stipulations and findings here to make out a *prima facie* case establishing that their employment was sufficiently closely related to activities of the various tenants in commerce as to be deemed an essential part of commerce itself. They argue also that this building, by virtue of all the various interstate activities conducted under its roof, was in effect a composite instrumentality of interstate commerce.

I.

Respondents were engaged in occupations necessary to production of goods for interstate commerce within the meaning of the Act and entitled to its benefits.

In its simplest aspect, the case at bar presents an application of the principle laid down by the Second Circuit Court of Appeals in *Borella v. The Borden Co.*, 145 F. (2d) 63 (C. C. A. 2, 1944), cert. granted Jan. 2, 1945, No. 688 for argument with this case. In that respect respondents here might well rely upon the arguments advanced by the respondents in the *Borella* case and by the Government as *amici curiae*, together with Judge LEARNED HAND's illuminating opinion below. If those arguments commend them-

selves to this Court, then it is submitted that respondents here are entitled to prevail, since a substantial portion of the building at 10 East 40th Street was occupied by tenants in quite the same category as The Borden Co. in the *Borella* case. But quite independently of the rationale of the latter case respondents are nevertheless entitled to prevail for other and different reasons into which the Court may be disposed to inquire further. This brief is therefore directed particularly toward such additional considerations.*

The test for application of the Act is the duties of the employees and the activities to which they relate, not the general nature of the building, or the employer's business.

1. Petitioner, in attacking the decision of the Second Circuit, has characterized the building in which respondents worked as a "typical metropolitan office building", or "multi-tenanted office building", and urged that prior decisions in "office building cases" in various Circuit Courts, a number of which this Court has declined to review, conflict with the result below here (Pet. Br. pp. 2-5, 12, 14). But this would ignore the fact that the appropriate test in determining whether employees have the benefits of the Fair Labor Standards Act is not the general nature of the employer's business or the general character of the building where their work is performed, but rather the *duties* of the employees and the particular *activities* to which the employees' functions immediately relate. *Kirschbaum v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet v. North Shore Corp.*, 318 U. S. 125; *McLeod v. Threlkeld*, 319 U. S. 491. And this is the more true where the employees in question are building service

* Italics have been added here for emphasis in quotations from cases, statutes and authorities.

workers whose functions are to take up and down to and from work the tenants and their employees and the materials with which they work, to guard the tenants' property against theft or fire, to keep the tenants' quarters in a state of decent repair, and to maintain the whole premises in a clean and habitable condition. *Kirschbaum v. Walling*, 316 U. S. 517. The result would thus depend, not upon a pre-judgment formulated by characterizing the nature of the building but upon "a practical judgment" after inquiring into the facts of the individual case. *Armour & Co. v. Wantock*, 323 U. S. 126. To accept petitioner's approach to the problem would be to stifle the inquiry at the threshold.

The tenants in manufacturing enterprises were engaged both in sales and also in executive and administrative work, as an integral part of their productive operations.

2. We may begin the inquiry by noting with the trial court that 26% of the rentable area and 29% of the rented space in the building was occupied by manufacturing and mining companies which used their offices for executive and administrative activities,¹ for conferences, for taking orders for substantial quantities of merchandise shipped from their factories and mines to customers in various states and, in the case of seven of these companies, for

¹ See finding 7 (Class 1) [R. 314]. The meaning of "administrative activities" is well-known in industrial management. It extends to those staff departments, such as purchasing, advertising, market research and similar forces which relieve the burden and increase the effectiveness of executive management in large enterprises. "As the managerial process grows in complexity, the time, ability and comprehension of single executives becomes increasingly inadequate and must be supplemented by staff agencies able to furnish specialized assistance and advice. . . . Staff departments do not create new functions but concentrate specialized attention upon certain phases of the management problem." Holden, Fish and Smith, *Top Management, Organization and Control* (1941) p. 36. The trial court recognized this, for it spoke of those manufacturing tenants which "maintain advertising departments in addition to other administrative activities." See finding 6 (parenthetical note following Class 5) [R. 314].

advertising and publicity work as well.² Petitioner draws from this finding only an admission that most of the tenants in this class leased space for sales offices (Pet. Br. pp. 4-5, 8). The record contained testimony of numerous disinterested witnesses; there were no disputed factual issues; and petitioner rested upon respondents' case and called no witnesses. Under the circumstances, recourse to the record for that full survey of the facts which is essential to "a practical judgment" is not unwarranted. Such recourse indicates that in only one or two instances was the work of tenants in the manufacturing group limited to selling; for the most part the manufacturing companies used their space also for such activities as planning and management, designing, market research, raw material purchases, traffic control, advertising and publicity, storage and shipment of goods, preparation of specifications for goods to be produced to order.³

Nor are manufacturers' sales activities, when performed under such circumstances as indicated in the present case, a remote or isolated element in the whole productive picture. Modern industrial enterprises are characterized by the close correlation of manufacturing and marketing func-

² Petitioner has sought to break down the effect of this finding by attempting to demonstrate that in reality, the greater part of the space occupied by these tenants was used "as sales offices only" (Pet. Br. p. 8). In this, petitioner ignores the fact that the finding as to "executive and sales" activities was enumerated in the conjunctive, including sales as only one component element; was supported by an admission in the answer (Pet. Ans., par. 8, R. 13); was drafted by petitioner and to be construed most strictly against the draftsman. Respondents had proposed other findings (R. 321-333). The Circuit Court construed this finding accordingly: "The executive offices of the manufacturing and mining concerns * * * occupy about 26% of the rentable area" (R. 342).

³ Of those singled out now by petitioner as "sales offices," note the following additional activities: *Ames Bag Machine Co.*—purchasing; *J. H. Dunning Corp.*—executive direction; *Thomas A. Edison Co. Inc.*—traffic control of exports and requisition and storage of merchandise; *General Motors Co.*—storage and shipment of goods; *Perolin Co. of N. Y.*—preparation of market estimates and advertising; *Tenn.-Eastman Corp.*—preparation of specifications for goods to order; *Vanity Fair Mills*—preparation of sales forecast and advertising; *S. S. White Dental Mfg. Co.*—preparation of designs and sales engineering. See references above, pp. 17, 19, 20, 21, 22, 26; compare Pet. Brief, page 8.

tions.* An essential part of the successful conduct by the many industrial tenants of 10 East 40th Street of their manufacturing and mining operations at plants throughout the United States is the groundwork of designing, planning, purchasing, market analysis, advertising and salesmanship laid down by office staffs and executives hundreds of miles away from the mines and factories from which the goods are subsequently shipped. Such activities are integrally related to the transformation of raw materials into finished products which will find a ready market with the consumer. The record in both cases clearly reveals that as carried on by large-scale producers such as The Borden Co., Forbes Lithograph Mfg. Co., and Cluett Peabody & Co., both management and marketing functions are a closely-knit part of their productive operations.⁵ No less essential a part of the manufacture of finished goods than the hand that performs a simple mechanical task on the assembly line is the creative talent which conceives the fundamental design from which the goods are reproduced, the driving energy which develops markets for them frequently before they have been manufactured, and the organizing ability which coordinates and controls all of the varied and widespread activities of the producer, all operating together towards the end of producing goods consumers will buy.⁶

The modern tendency towards industrial integration has been aptly summarized by one of the country's leading authorities on merchandising methods:

During the last twenty-five years great changes have taken place in the methods and scale of production * * * Following the close of the World War

* Pyle, J. F., *Marketing Principles* (1931), page 17.

⁵ See also Frey, A. W., *Manufacturers' Product, Package and Price Policies; Modern Merchandising* (1941), page 17.

⁶ See Converse, Paul D., *Elements of Marketing* (2nd Rev. Ed., 1940) Chap. 31.

producers found themselves with excess capacity. Consequently they were forced to devise ways and means of stimulating demand for the goods they were equipped to manufacture. Improved methods of sales promotion, advertising, salesmanship, instalment selling, prompt and immediate delivery and other forms of service were manifested along with improvements in production designed to reduce cost * * * Since 1920 there has been a decided turn toward marketing goods in direct line from producer to consumer.⁷

From the point of view both of economic theory and of practical industrial management, the marketing and distribution of goods are treated as a vital part "of all *productive* activities".⁸ The merchandising function "must be performed in every manufacturing enterprise, large and small, from United States Steel Corporation and General Motors down to the one-man shop".⁹ A major problem of modern industry is to adjust production capacity and the supply of goods to present and future market needs. "This coordination of production and marketing demands on the part of industrial management a definite knowledge of what to produce, how much to produce and where to produce. This information can be secured only after learning who can and will buy. * * * The ideal is to determine in advance the market potentials and then gear production accordingly."¹⁰

⁷ Pyle, J. F., *Marketing Principles* (1931) page 12 ff.

⁸ See Converse, Paul D., *Elements of Marketing* (2nd Rev. Ed., 1940) page 1 ff.; Converse, Paul D., *Essentials of Distribution* (1936) page 3.

⁹ Fr y, A. W., *Manufacturers' Product, Package and Price Policies; Modern Merchandising* (1940) page 5.

¹⁰ Pyle, J. F., *Marketing Principles* (1931) page 28. See also Barker, C. W., *Modern Marketing* (1939) page 1 ff.; Converse, Paul D., *Essentials of Distribution* (1936) page 15; Agnew, H. E. and Houghton, D., *Marketing* (1941) page 18, citing Ruskin's essay *Unto This Last* (1851): "Consumption absolute is the end, crown and perfection of production * * *. Production does not consist in things laboriously made, but in things serviceably consumable."

In view of these essential facts implicit in modern industrial organization, to deny that the functions of purchasing, designing, planning, advertising, selling and management carried on in manufacturers' executive and administrative and sales offices at 10 East 40th Street are an integral part of the "production of goods for commerce" by these manufacturers would be to ignore economic realities. In its most recent consideration of the reach of the Act in cases involving "production" this Court recognized that

More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production.

Armour & Co. v. Wantock, 323 U. S. 126.

And the Administrator of the Wage and Hour Division from an early date in the Act's enforcement recognized the intimate relationship to "production" of work of manufacturers' office forces and advertising staffs, although performed at a distance from the plant where the goods are turned out.¹¹ This view, based upon "considerable experience" and providing a "practical guide", is "entitled to respect". *Skidmore v. Swift & Co.*, 323 U. S. 89 L. Ed. 125.

¹¹ Opinion Manual of the General Counsel, Wage and Hour Division, U. S. Department of Labor (1940) Vol. I, pages 27, 34:

"Employees in office forces are 'engaged in production of goods for commerce' even though they do not perform their work at plant where goods are produced." (12-5-38-Wise, Whitney & Canfield-260.)"

"Employees of art department of rubber company making set-ups for advertising department of concern are engaged in the production of company's products, as relationship between production of goods and creation of art work for use in advertising goods is so intimate as to warrant such a conclusion. (3-24-39-Raymond J. Finley-043.)"

Despite division of manufacturing, storage, sale, distribution, machine repair and executive direction among different buildings and employers, maintenance workers are necessary to production.

3. Turning now to the problem of legal interpretation, we may perhaps best proceed as did Judge LEARNED HAND in *Borella v. The Borden Co.*, with the inquiry whether employees in respondents' position are within the statute when they perform their work in a building where all the activities of manufacture and sale, together with the administrative direction of the business, take place under one roof. Authorities do not lack that under such circumstances watchmen, mechanics and other maintenance employees similar to respondents here are engaged in activities "necessary" to production and thus within the statute's protection.¹² And the same result appears to be indicated where the various components of productive enterprise such as manufacture, sale, executive direction, storage and shipment of goods are divided among several buildings not at the same physical location.¹³ Nor have the courts cre-

¹² *Fleming v. Atlantic Co.*, 40 F. Supp. 654, 657 (N. D. Ga. 1941) aff'd, 131 F. (2d) 518 (C. C. A. 5, 1942); *Fleming v. Swift & Co.*, 41 F. Supp. 825, 830 (N. D. Ill. 1941) aff'd, 131 F. (2d) 249 (C. C. A. 7, 1942); *Fleming v. Hamlet Ice Co.*, 1 Wage Hour Cases 764, 4 Labor Cases par. 60,676 (E. D. N. C. 1941) aff'd, 127 F. (2d) 165 (C. C. A. 4, 1942), cert. den. 317 U. S. 634. In the *Atlantic Co.* case the court recognized that "services of clerical help * * * are essential to production * * * such employees are employed in producing, handling and working on * * * goods * * * the services of the clerical help * * * are so intimately and directly connected with * * * production and sale * * * as to be an essential part thereof (40 F. Supp. 654, 657). Here was recognition of the "integrated" theory of production and of the immediate necessity of maintenance work to all of the component elements."

¹³ *Johnson v. Phillips-Buttorff Mfg. Co.*, 178 Tenn. 559, 160 S. W. (2d) 893 (Sup. Ct. Tenn. 1942), cert. den. 317 U. S. 648; *Strough v. Coll*, 6 Wage Hour Rept. 615, 7 Labor Cases par. 61,644 (E. D. Pa. 1943). In the *Johnson* case, a watchman employed by a manufacturer covering different buildings housing the executive offices, wholesale warehouse and wholesale-retail selling outlets was held necessary to production. The principal manufacturing operations took place at a separate location. See *Walling v. Phillips-Buttorff Mfg. Co.*, 57 F. Supp. 543 (M. D. Tenn. 1944). In the *Strough* case, plaintiff worked as a watchman and handyman, sometimes assisting with crating of goods for shipment, at a building where goods were stored and distributed at a separate physical location from the employer's manufacturing plant.

ated an artificial distinction where the various functions, such as manufacture, maintenance of machinery, storage and distribution, are divided not only among several buildings but among a number of employers. Thus within the ambit of the Act as engaged in a "process or occupation necessary to production" is a night watchman employed by a warehouseman to guard a building where tobacco is stored for aging, then later shipped to manufacturers of nationally-distributed brands of cigarettes, work held "necessary to production of the manufactured product of the stored tobacco";¹⁴ an engineer, a watchman and a truck driver of an employer performing processing on boxes, later finished at a separate plant and then delivered to customers in the same state who packed their products in the boxes and shipped them in commerce;¹⁵ a clerical staff serving maintenance men of a separate machine repair company maintaining factory equipment for manufacturers producing goods for commerce.¹⁶ Compare *Kirschbaum v. Walling*, 316 U. S. 517.

Geographical dispersion of the various components of productive enterprise to acquire economic advantage does not remove maintenance employees from intimate relationship to the essential elements producing goods for commerce.

4. Petitioner's principal objection to the result reached by the Second Circuit is that executive and administrative

¹⁴ *Reliance Storage Co. v. Hubbard*, 50 F. Supp. 1012 (W. D. Va. 1943).

¹⁵ *Walling v. Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544, 7 Labor Cases par. 61,724 (D. Minn. 1943).

¹⁶ *Holland v. Amoskeag Machine Co.*, 44 F. Supp. 884 (D. N. H. 1943). See also *Roland Elec. Co. v. Walling*, 146 F. (2d) 745 (C. C. A. 4, 1945)—where mechanics and office employees of an electrical concern repairing and reconditioning used motors for manufacturing companies within the same state, for use in producing goods for commerce, were held "engaged in the production of goods for commerce" within the meaning of the Act. The court stated that "the services rendered to producers of goods for interstate commerce in the installation and repair or wiring, and the repair, servicing and reconditioning of motors are sufficient without more to bring the employees of the company under the Act."

and marketing functions fulfilled by the manufacturers' office forces and executives at 10 East 40th Street are many miles removed from the actual scene of factory and mine operations (Pet. Br. pp. 2-4, 12-13). This is apparently the basis for the further contention that the building service employees contributing to convenient and efficient operation of the tenants' activities are too remotely connected with production to be regarded as engaged in "any process or occupation necessary to the production thereof in any State" (compare Pet. Br. pp. 2-4, 9-10).

But it is manifest from the precise language of the Act that Congress foresaw the application of this definition to the widespread activities of producers performing various steps, processes and operations ultimately resulting in the distribution of goods in commerce dispersed through a number of different states to their own economic advantage. Thus Congress used the exhaustive phrase "*any process . . . in any State*", in the definition of "production" in Section 3 (j). Indeed, this Court has recently held that the enumerated activities in Section 3 (j) following the word "produced" are to be read to relate to "*all steps whether manufacture or not, which lead to readiness for putting goods into the stream of commerce,*" including "*every kind of industrial operation preparatory*" to such distribution. *Western Union Tel. Co. v. Lenroot*, U. S. , 89 L. Ed. 289. The work of the manufacturing and mining tenants at 10 East 40th Street was such preparatory activity and constituted "production for commerce" even without recourse to the further extension of the comprehensive definition to "any process" necessary thereto.

Further, petitioner's argument that respondents' activities were far removed from production is based on a conception of geographical removal from "actual production at distant places" (Pet. Br. pp. 2, 4, 12-13). But since

Kirschbaum v. Walling, 316 U. S. 517, this Court has recognized that maintenance employees may be "necessary" to production without regard to manual participation in machine operations. See also *Walton v. Southern Package Corp.*, 320 U. S. 540; *Armour & Co. v. Wantock*, 323 U. S. 126. If the functions of maintenance employees may be deemed "necessary" to production although performed in a part of the building distant from the machine processes, at a time when machine operations are stilled, or in a separate building, as in the cases upon which this Court has passed, no compelling reason appears why the tie with production is any less "necessary" where the maintenance work is in a distant city, particularly where it provides the means toward efficient conduct of steps in production and direction of vast productive enterprises.

The activities of great manufacturing companies engaged at 10 East 40th Street in creating designs identically reproduced in each item of finished product turned out at out-of-state plants, transmitting to mills and factories detailed production instructions, purchasing all the raw materials essential to manufacture of nationally distributed products, taking and forwarding orders for goods to be produced to specifications, devising advertising on a national scale, formulating selling programs and speeding deliveries, planning and coordinating productive operations and performing all of the other functions integrally related to successful and efficient conduct of industrial enterprises "producing goods for commerce, have no mere "tenuous relation to production"—they are indispensable in its conduct. It follows that building maintenance employees serving these tenants regularly and continuously are "necessary to the production".

Tenants preparing designs, photographic publicity releases, advertising copy, magazine layouts, performed an initial productive step on parts or ingredients of publications intended for interstate distribution.

5. Nor may we ignore the fact that "goods" were directly and specifically physically "produced" for commerce within the meaning of the Act in the 10 East 40th Street building. "Producing" and "working on" goods in the formative stages of production were those tenants preparing designs, taking and developing photographs, writing advertising copy and publicity releases, editing and laying out magazines and publications, arranging and correcting manuscripts and printers' proofs, and depicting commercial art conceptions. The Second Circuit held here that "the publicity concerns which design a substantial part of the advertising material, lithographed and printed matter, etc., which are shipped in interstate commerce come within the definition" of "production". 146 F. (2d) 438, 440. Such tenants by a preliminary process which is the initial step in a series of operations culminating in the manufacture of finished magazines, advertising displays and other printed and lithographed matter for interstate distribution in vast quantities perform work upon a "part or ingredient" of such goods. Since the benefits of the overtime provisions of the Act extend to all those engaged in "production of goods for commerce", it is obvious that the definition of "goods" in Section 3(i) is no less important than the definition of "production" in Section 3 (j) in determining whether employees come within the Act. See *Western Union Telegraph Co. v. Lenroot*, U. S. , 89 L. Ed. 289.

There can be little doubt, to take but one example, that the art motifs conceived and worked upon in the building by Forbes Lithograph Mfg. Co. artists and sent to the Chelsea, Mass. plant of the company to be identically re-

produced and subsequently distributed throughout the United States, involved an essential "process" in the production of a "part or ingredient" of the materials turned out on the company's out-of-state presses. The very use by witnesses in the industry of the term "*reproduction*" to describe such plant operations (R. 38, 59-60) indicates a concept of the basic creative work as constituting original "production".

The legislative history of Section 3 (j) further confirms the position that the preparation of designs, art concepts, packaging and container models and similar items identically reproduced by subsequent plant operations comes within the definition of "production". Earlier drafts of the provision later enacted as Section 3 (j) did not contain the clause "in any process or occupation necessary to the production thereof, in any State". Instead, the proposed definition included the phrase "in the making of tools and dies used in the production of such goods in any State". See S. 2475, 75th Cong., 1st Sess., Sec. 2(a)(24), May 24, 1937; H. R. 7200, 75th Cong., 1st Sess., Sec. 2(a)(24), May 24, 1937. Subsequently Congress substituted the obviously broader language of Section 3 (j) as enacted. Accordingly, there can be little question of congressional intention to include work in the making of patterns, models and designs serving as an initial step in the successive processes of production.

Similar considerations apply in the case of tenants using space rented in the building for the conduct of publishing, advertising and publicity activities. Editorial work at 10 East 40th Street in arranging, preparing and correcting magazines, trade publications and advertising and publicity copy subsequently identically reproduced at plants elsewhere is a preliminary "process" of "production" of a "part or ingredient" of the publications in which the work appears, upon ultimate issue, for national distribution.

Both in common understanding and in trade usage publishing activities are commonly regarded as an integral part of production of items of the graphic arts. And this is true of preparation and issuance of printed and lithographed matter whether performed by the printer or in a separate publishing office.¹⁷

As outlined by one authority on modern "magazine making",¹⁸ editorial activities are clearly steps in the closely integrated processes which together constitute the manufacture of magazines—steps which contribute both to economy and to continuity of production:

A manuscript follows a perfectly definite routine in its progress from the editor to the reader. Having been scheduled for publication, it goes to the copy reader, who prepares it for the printer. It is then set, and the first or "office" proof is taken and corrected. The next set of proofs is sent to the editor as "author's proof" or "first proof". These are usually galleys—that is, proof taken from type placed in the galley before it has been paged. * * *

In this stage, while the printed matter is still strung out on long sheets of paper * * * changes are more easily and less expensively made than later. * * * Corrections having been indicated, the proof is returned to the printer who makes necessary changes in type * * *. The printer also divides the long galleys of type into pages and then submits a new set of "page proofs". * * * It is usually advisable to check carefully each line in which a correction * * * has been made. * * * All such matters

¹⁷ Sixteenth Census of the U. S., Census of Manufactures (1939), Vol. II, part 1, page 679, Group 8—*Printing, Publishing and Allied Industries*: "The group includes publishers doing no printing, publishers doing their own printing, and printers doing no publishing."

Executive Office of the President, Bureau of Budget, *Standard Industrial Classification Manual* (1941), Vol. I, page 3: "Printing, publishing and industries servicing the printing trades are classified as manufacturing industries."

Sixteenth Decennial Census, U. S. Bureau of Census, *Instructions to Enumerators for Business and Manufactures* (1939), page 16: "Establishments engaged in printing or in publishing (with or without printing) * * * are also included in the census of manufactures."

¹⁸ Bakeless, John, *Magazine Making* (1931), page 97 ff.

should be carefully scrutinized before copy leaves the editorial office. When copy goes to the printer it should correspond in every particular to the article as the editor wishes it to appear.

The problem of reading and editing manuscripts is noted by this authority¹⁹ in the following terms:

The first problem is recording the manuscript and, after that, keeping track of it as it passes from hand to hand in the editorial room. . . . It is the first reader's duty to reject out of hand the plainly impossible scripts. . . . Once past the first reader, the manuscript is still little more than started on its way. The relatively small sheaf that is considered worth passing on to another editor is now parcelled out among the staff according to their special interests. . . . Almost all authors over-write and their work must normally be somewhat reduced in length by the editor.

Nor is there any question that the editor must understand printing sufficiently to perform his vital part in the making of magazines:²⁰

The editor must understand printing at least sufficiently to give the printer clear instructions and sufficiently also not to demand what is plainly impossible The editor and his assistants require only such knowledge of printing processes and problems as will promote their own efficiency. Their knowledge naturally must begin at the point where the purely editorial processes first come into contact with mechanical processes—with type and type setting.

In other words, the magazine editor holds the whole thing together.²¹ Not least among the editorial functions

¹⁹ Work last cited, page 150 ff.

²⁰ Work last cited, Chap. 3.

²¹ Lohn, Lenox R., *Magazine Publishing* (1932), Chap. 1.

is "liaison with the printer", that is handling of proofs, correcting of grammatical and typographical errors, making up of dummy format to show exact arrangement of stories, articles, advertisements, etc.; this "includes indicating size of type, indentations, character of type faces, leadings, subtitles, footnotes and special instructions."²² This was the work done at 10 East 40th Street by the publishing tenants; the close integration with printing operations is apparent.

Advertising is also "produced", in trade parlance.²³ Even where copy is not written by the advertiser, a good part of the company advertising manager's work is "of a creative nature." In this connection "he is responsible for a variety of activities that have to do with devising and giving form to the company's advertising."²⁴ And where an outside agency prepares actual copy, the advertising manager still has definite production responsibilities:²⁵

For instance, in a typical company the advertising manager checks and approves the layout, copy, and art work for correctness, effectiveness, and compliance with company policy. He holds frequent conferences with the copy and idea men in the agency to direct and approve their work. He studies competitors' copy. He assembles ideas for advertising from various outside sources and cuts and translates them into practical application. In this company the advertising manager performs the function of acting as a clearance point between the agency and the executives of such departments as sales, engineering, legal, etc., as well as the general management, all of whom are directly interested in the ad-

²² Work last cited, page 37.

²³ Dippy, A. W., *Advertising Production Methods* (1927) page 1. ff. Metropolitan Life Insurance Co., Policyholders Service Bureau, *Functions of the Advertising Manager*, pages 17-19.

²⁴ Work last cited, pages 15-16.

²⁵ Work last cited, page 17.

vertising copy. The company requires that all advertising copy be submitted before publication.

Here, too, "the handling of typography enters largely into advertising production".²⁶

This was the work done by advertising managers of such tenants as Beechnut Packing Co. and Vanity Fair Mills. The publicity offices of Eastman Kodak and Carl Byoir & Associates, Business Organizations, and all of the trade organizations and the technical advertising agencies, wrote the actual copy in the building. Perolin Co. of N. Y., Arkell Bag Co. and Forbes Lithograph both prepared copy in the building and sent out from there the materials worked upon. Cluett Peabody & Co. produced some types of its advertising at 10 East 40th Street, dealt through outside agencies as well.²⁷

The view that advertising, publishing and collection and dissemination of trade information under such circumstances constitutes "production of goods" was adopted by the Administrator from an early date in the Act's enforcement. In 1938 he stated as his opinion²⁷ for the guidance of the public:

It seems clear that the term "goods" includes publications, pamphlets, or any other written materials. Accordingly, employees engaged in collection and dissemination of information transmitted to other States in form of publications, pamphlets, or any other written materials are engaged in production of goods for commerce even though the actual work of printing may be done by an independent printing establishment. Typically this would apply

²⁶ Work last cited, page 23.

^{26a} See references above, pages 11-17, 21, 23, 25-33; Appendix, Tables II, IIa.

²⁷ Wage and Hour Division, U. S. Dept. of Labor, Interpretative Bulletin No. 5, par. 8, 1942 Wage and Hour Manual, page 27. The Bulletin was originally issued December 2, 1938 and revised without substantial change in this paragraph on November 27, 1939. See also Wage and Hour Division, U. S. Dept. of Labor, First Annual Report of the Administrator (1939) pages 15-18.

to employees of organizations such as trade associations and research and compilation services.

And the Administrator likewise, soon after the Act became effective, in response to numerous inquiries from employers, employees and attorneys, advised inquirers that the benefits of the Act extend under the definition of "production" to commercial art work, to the taking, developing and finishing of photographs and to the preparation of articles and advertising material for publication, where such items are ultimately incorporated in finished goods distributed nationally.²⁸ Under the circumstances, these opinions constitute "a body of experienced and informed judgment to which courts and litigants may properly resort for guidance". *Skidmore v. Swift & Co.*, 323 U. S.

89 L. Ed. 125. They become the more persuasive in the present regard in the light of the recent indication by this Court that the comprehensive definition in Section 3 (j) "catches up into the category of production every step in putting the subject of commerce in a state to enter commerce." *Western Union Tel. Co. v. Lenroot*, U. S., 89 L. Ed. 289.

While the question has been little litigated, authorities do not lack that employees in respondents' position here are "necessary" to the "production of goods for commerce"

²⁸ Opinion Manual of the General Counsel, Wage and Hour Division, U. S. Department of Labor (1940) Vol. 1, pages 26, 34, 31.

"Generally, employees of trade associations are deemed to be within coverage of Act. Employees engaged in clerical work of association and in work incidental to preparation of publications of association are under Act. (5-11-39-Texas and Southwestern Cattle Raisers Association, Incorporated-0161.)"

"Commercial artist who plans, arranges, and paints in lettering used in advertisements ultimately printed in publications and magazines having a national circulation is entitled to benefits of Act (6-5-39-Jack A. Nadel-0216.)"

"Employees engaged in taking pictures in temporary studios located outside state and employees engaged in connection with work of finishing pictures in a studio located within state, after which the pictures are sent to patrons outside state, are entitled to benefits of Act. (1-18-39-Montgomery Studios-618.)"

where they perform, even in another's employ, functions auxiliary to publishing, advertising, and printing operations.²⁹ It appears that the combination of space leased at 10 East 40th Street by tenants engaged in advertising; publicity and trade publication work with space occupied by tenants in the manufacturing class for advertising, publicity and editorial offices totals more than 20% of the rentable area.³⁰ Thus not only were the individual activities of these various tenants, substantial in relation to goods ultimately shipped in commerce, but a substantial portion of the entire space in the building was regularly and continuously devoted to such activities. Respondents who served these tenants were, therefore, entitled to the benefits of the Act, as "necessary" thereto.^{30a}

²⁹ See *Walling v. Allied Messenger Service*, 47 F. Supp. 773 (S. D. N. Y. 1942); *Schineck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037, 49 N. Y. Supp. (2d) 872 (City Court, N. Y. C., N. Y. Co. 1944); *Bittner v. Chicago Daily News*, 7 Wage Hour Rept. 1173, 9 Labor Cases par. 62,479 (N. D. Ill. 1944). See also *Walling v. Higgins*, 47 F. Supp. 856 (E. D. Pa. 1942)—pasting up of advertising sample books to be sent by mail by advertisers to their customers is "production of goods for commerce"; *Walling v. Sun Publishing Co.*, 47 F. Supp. 180 (W. D. Tenn. 1942) aff'd 140 F. (2d) 445 (C. C. A. 6, 1944)—functions of reporting, editorial selection, preparation for printing, transmission of copy and proofs by mail and gathering, preparing, printing and circulating by mail news matter are "production of goods for commerce."

³⁰ See Appendix, Tables II and IIa, indicating a total of 52,353 square feet (15,520 + 37,015) occupied for these purposes. The total rentable area was 234,245 square feet. See also findings 5, 6 (class 5 and parenthetical note following 6, and 7 (class 1 and class 5) [R. 313-315]. Petitioner's answer conceded that 10% of the space was leased to "advertising and photographic studio companies" (R. 13). This does not include the manufacturing companies occupying space for advertising purposes or Standard Magazines. See footnote 26a above and Pet. Brief, page 6, fn.

^{30a} Petitioner makes much of an assumed absence of a "close and immediate tie" to production of this character and a somewhat ambiguous finding as to the volume of such business as compared with the entire volume of business of all of the tenants in the building. The latter, if relevant, is not based on the record, for there was no testimony as to the activities of half of the tenants, and none as to the volume either of their business or of the entire business of all tenants. [With Pet. Br., pp. 5, 13, 28-30; finding 6 (Class 5), 7 (Class 5), 8 (R. 313-316) compare findings 10-11 (R. 317) and discussion under subheadings 9 and 10 of the present point in this brief.]

The courts have uniformly recognized that production carries back to the initial stages and have held maintenance workers no closer to ultimate physical distribution of goods in commerce than were respondents here to be necessary to such production.

6. This Court has not hesitated to recognize that the concept of "production" carries back to the initial stages, no matter where or by whom performed. See *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, which applied the Act to employees of a contractor drilling for oil, the well being brought in by a different crew and, after refining elsewhere, distributed in commerce. Compare *Western Union Telegraph Co. v. Lenroot*. And the work of watchmen, mechanics, handymen and other maintenance employees has been frequently held "necessary" to preliminary processes of production or to the turning out of "a part or ingredient" of finished goods eventually moving into the stream of commerce, in numerous cases where the employees' work was no closer to ultimate physical distribution of goods in commerce than was that of the workmen at bar.

Thus, the Act has been applied to (1) a watchman guarding a pipeline used to convey crude oil from a well to a refinery in the same state where, after processing, refined products were shipped in commerce³¹; (2) mechanics repairing and oiling grain elevator machinery and purchasing and receiving grain subsequently sent to a mill in the same state for processing into flour for commerce³²; (3) maintenance men of a water supplier keeping in trim the borders of irrigation ditches to prevent impediment to continued flow of water to farmers and miners who used the water in the same state as an element in producing their

³¹ *Mid-Continental Pipe Line Co. v. Hargrave*, 129 F. (2d) 655 (C. C. A. 10, 1942).

³² *Nobleville Milling Co. v. Murray*, 131 F. (2d) 470 (C. C. A. 7, 1942) cert. den. 318 U. S. 775.

products for commerce³³; (4) a watchman guarding an idle oil rig after completion of one job, prior to removal to another site for drilling a new well in production of oil for commerce³⁴; (5) handlers in a scrap-iron yard, sorting scrap subsequently melted down for use in the same state in producing steel later incorporated as a component part in construction of ships³⁵; (6) maintenance employees repairing tracks and equipment and cutting fuel for engines used to convey raw sugarcane from farms to Puerto Rican mill where sugar was refined for removal to warehouses from which it ultimately moved from the island in commerce³⁶; (7) mechanics repairing equipment for a logger felling timber in the forest for sale to a match company in the same state which manufactured and shipped the finished matches in commerce³⁷; (8) a watchman at a river landing stage guarding coal barges en route from mines to ovens making coke for subsequent use in the same state in the processing of steel for commerce³⁸; (9) an engineer of a development company supplying power to motion pic-

³³ *Keynolds v. Salt River Water Users*, 143 F. (2d) 863 (C. C. A. 9, 1944) cert. den. 65 Sup. Ct. 117.

³⁴ *Robertson v. Oil Well Drilling Co.*, 47 N. M. 1, 131 Pac. (2d) 978 (Sup. Ct. N. M. 1942).

³⁵ *Bracey v. Luray*, 138 F. (2d) 8 (C. C. A. 4, 1943). See also *Robinson v. Larue*, 178 Tenn. 197; 156 S. W. (2d) 432 (Sup. Ct. Tenn. 1941), involving a watchman at a similar scrap yard.

³⁶ *Calaf v. Gonzalez*, 127 F. (2d) 934 (C. C. A. 1, 1942); *Bowie v. Gonzalez*, 117 F. (2d) 11 (C. C. A. 1, 1941); *Gonzalez v. Bowie*, 123 F. (2d) 387 (C. C. A. 1, 1941); *Collazzo v. Gonzalez*, 5 Wage Hour Rept. 387 (C. C. A. 1, 1942). See also *Flores v. Baetjer*, 1 Wage Hour Cases 728, 4 Labor Cases par. 60,673 (D. P. R. 1941).

³⁷ *Allen v. Moc*, 39 F. Supp. 5 (D. Ida. 1941). Employees performing the "first step" in the productive process have been held "engaged in the production of goods for commerce" even where the only commodities moving out-of-state are by-products processed from waste materials elsewhere. See *Peoples Packing Co. v. Walling*, 132 F. (2d) 236 (C. C. A. 10, 1942) cert. den. 318 U. S. 774; *Sykes v. Lochmann*, 156 Kan. 223, 132 Pac. (2d) 620 (Sup. Ct. Kan. 1943) cert. den. 319 U. S. 753; *Brooks Packing Co. v. Henry*, 192 Okla. 533, 137 Pac. (2d) 918 (Sup. Ct. Okla. 1943).

³⁸ *Shepler v. Crucible Fuel Co.*, 6 Wage Hour Rept. 185, 6 Labor Cases par. 61,444 (W. D. Pa. 1943) reversed on other grounds 140 F. (2d) 371 (C. C. A. 3, 1943).

ture studios turning out film negatives for ultimate national release³⁹; (10) a cook's helper serving meals to loggers in a lumber camp near site where the employer engaged in cutting pulp wood subsequently sold to a paper company for conversion within the same state into products distributed throughout the country.⁴⁰

The only distinction between the functions of the maintenance employees in all of these cases and those performed by the respondents at bar is that there the employees facilitated processes and operations involving manual labor, whereas here they served white collar workers. Of course, this distinction is one without a difference insofar as the comprehensive definitions in Sections 3(i) and 3(j) of the Act are concerned. This Court has recently indicated that "goods" within the meaning of Section 3(i) includes messages, orders, information and intelligence, such as are customarily worked upon by white collar workers. *Western Union Tel. Co. v. Lenroot*. The exemption provided in Section 13(a)(1) for bona fide executive, administrative and professional employees is further indication of the congressional understanding that the Act's scope would extend to activities of such employees in the absence of the exemption. To construe Section 3(i) broadly, while at the same time limiting application of Section 3(j) more narrowly here, would exclude the contribution of white collar workers and those who serve them to production, "infer congressional idiosyncrasy" and "impute to Congress a desire for incoherence . . . where policy justifies none."⁴¹ The definitions of "production" and "goods" together im-

³⁹ *Richardson v. Delaware Housing Assn.*, 6 Wage Hour Rept. 472, 7 Labor Cases par. 61,583 (S. D. Fla. 1943). See also *N. M. Public Service Co. v. Engel*, 145 F. (2d) 636 (C. C. A. 10, 1944).

⁴⁰ *Hanson v. Lagerstrom*, 133 F. (2d) 120 (C. C. A. 8, 1943). See also *Consolidated Lumber Co. v. Womack*, 132 F. (2d) 101 (C. C. A. 9, 1942). These cases were cited with apparent approval in *McLeod v. Threlkeld*, 319 U. S. 491.

⁴¹ *Kiefer v. R. F. C.*, 306 U. S. 381, 393-394.

plement the single phrase "production of goods for commerce"; they are to be read as one definition. So reading them, the maintenance employees in the present case were just as closely related to steps in the productive process as carried on by the tenants at 10 East 40th Street as were the maintenance employees in the other cases cited. Here, as there, the work in question obviously contributed both to economy and to continuity of production.

In any event, textile designs, photographs, publicity releases, advertising matter, publication layouts and proofs, commercial art work, were goods produced for commerce in the building.

7. Apart from what has been said above about such items as part of subsequently published matter, the photographic prints, advertising copy, publicity releases, commercial art paintings, magazine manuscripts and printers' proofs prepared and worked upon at 10 East 40th Street, as well as the textile designs, were themselves "goods" within the meaning of Section 3(j). The definition extends to intangible "subjects of commerce". *Western Union Tel. Co. v. Lenroot*. These were tangible "articles of commerce."⁴² The use by Congress of the word "articles" which in one of its common meanings includes written

⁴² See also Opinion Manual of the General Counsel, Wage and Hour Division, U. S. Dept. of Labor (1940) Vol. I, pages 25,162:

"Employees engaged in typing envelopes, folding sheets, and sealing envelopes containing a pamphlet or book which is shipped in interstate commerce are engaged in production of goods within meaning of word 'produced' under Section 3 (j) and are entitled to benefits of Act. (3-24-39-F. T. Brennen-046.)"

"Employees engaged in finishing and developing roll films originating all over United States and returned to such places are entitled to benefits of Act. Under Section 3 (j) an employee is engaged in production of goods for commerce if he is employed in producing, manufacturing, etc., or in any other manner working on goods in any state. (12-28-38-Eastman's Studio-439.)"

These opinions become the more persuasive in the light of the fact here that such items were frequently shipped in bulk, involved creations of such large size that they could not be sent by mail and were crated preparatory to shipment by express (R. 31, 38, 41, 86).

manuscripts and printed items is not without significance. These creative items not only were intended to be but actually were regularly and continuously shipped across state lines by mail and express to newspapers, magazines, printing plants and mills in other states. Those engaged in their preparation were thus producing "for commerce" within the meaning of the Act. See *U. S. v. Darby Lumber Co.*, 312 U. S. 100, 117, 118.

While it is not necessary to the result here, it may be urged further that the preparation of telegraph messages and sales orders, such as were regularly and continuously formulated in the building by many of the tenants in regular pursuit of their business purposes, prior to interstate transmission by the government mails or the telegraph company, constituted "production of goods for commerce" within the meaning of the Act. *Western Union Tel. Co. v. Lenroot*, citing *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356. The constant flow of such messages has been conceded.⁴³ Compare *International Text Book v. Pigg*, 217 U. S. 91, 106-107.

Selling, whether by manufacturers' own forces or by sales agencies, is an essential function in productive enterprises and economically a part of production, particularly where sales are to specification.

8. Finally, the work of a number of manufacturers' and mine sales agents at 10 East 40th Street in taking orders for millions of dollars worth of goods annually and forwarding such orders with shipping instructions, to arrange for and speed shipments, was clearly one of those steps "which lead to readiness for putting goods into the stream of commerce" at out-of-state mines and mills. Compare *Western Union Tel. Co. v. Lenroot*. It would be difficult

⁴³ See stipulation, par. 9 (R. 309). Petitioner has further conceded that a number of tenants occupying a significant amount of space were "trade organizations whose principal function is to gather and disseminate trade information" (Pet. Br., p. 6).

to imagine how the stream of goods could be made ready for commerce at shipping platforms and /pit-heads were such orders and instructions not regularly received. And this is the more true in the case of orders taken for goods to be manufactured to specification or upon order, of which there were numerous evidences here." In the latter case, it is obviously the order which starts the production line rolling.

The record makes clear that the sales offices are in regular and continuous touch by mail, telephone and telegraph with those who man the wheels of industry and ship the finished goods. Indeed, it is this very ease of communication which enables the nation's leading manufacturers and mining concerns to avail themselves of the economic advantage of locating their sales offices or sales agencies in the nation's principal financial or merchandising centres, where their customers may be centrally and readily served. Further, it is this economic advantage which makes possible the housing in one "skyscraper", such as the 10 East 40th Street building, of the pulses which initiate and lend direction to production and to that "orderly and fair marketing of goods in commerce" to

⁴⁴ A sales agent for several Virginia and West Virginia coal mining companies sells \$1,250,000 worth of coal annually for delivery across state lines, transmits shipping instructions, forwards orders from 10 East 40th Street (R. 109-110). It has been stipulated that these operations typify activities of some ten other tenants who are agents for manufacturers of textiles, chemicals, terra cotta products and other goods (R. 301-302). Other manufacturers' agents market: rayon yarns, by sales both from stock and made up to order at Tennessee mills at least \$300,000 per year, sending orders and instructions for routing shipments (R. 116-121; Pl. Ex. 17); antimony metals and oxide, yearly sales exceeding \$2,000,000, for shipment from Texas smelter plant, bills of lading sometimes prepared and forwarded from 10 East 40th Street (R. 201-202); tobacco products, in agent's special brands, gross volume per annum approximately \$500,000 for delivery from Florida and Pennsylvania plants, shipping instructions transmitted with order (R. 230-234); paper, both sold from stock and made up to specifications, by mills in several states, grossing \$500,000 per year (R. 252-256); tubes and bottle caps, all produced to specifications sent with order to West Virginia factory, sales averaging \$150,000 per year (R. 290-292). "As a result of the efforts of these agencies substantial amounts of merchandise of substantial value are shipped across state lines from factories, mines and warehouses" (finding 7, class 2) [R. 314]. [Italics added.] About half of the manufacturing tenants also take orders for goods to be produced to specifications. See references, pages 11, 18, 19-23 above.

which the Congress referred in its findings of fact and declaration of policy in Section 2 of the Act. The Circuit Court here recognized this integration of modern manufacturing and marketing, selling and shipping operations in holding that "the activity of the sales agents is economically necessary to the production of goods". 142 F. (2d) 438, 441.

Note further that the Second Circuit in its opinion reached the conclusion that "A sales agent who procures the contracts in performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting' " and that "Moreover, sales agents may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another." 142 F. (2d) 438, 440-441. As to the first of these reasonings, slightly reoriented it meets the test laid down in *Western Union Tel. Co. v. Lenroot*, for the sales agent's contribution is to "handling" and "working on" the goods, and takes its effect as a "step in putting the subject of commerce in a state to enter commerce", prior to delivery to the carrier at the out-of-state plant. The second recognizes an obviously common meaning of the word "handling" as including "to buy and sell, to deal or trade in" a commodity.⁴⁵

Authorities relied on by petitioner based contrary conclusions upon doctrine of commerce, not production, and inadequate factual showing; the facts here are adequate and the appropriate test less exacting.

9. Petitioner's principal objection to the result reached in the Circuit Court and the principal ground upon which it rested its application for certiorari is an assumed conflict between the decisions of the Second Circuit and the decisions of some six other Circuit Courts of Appeals, together with the Court of Appeals of New York. These, according

⁴⁵ *Webster's New International Dictionary* (1933) page 978.

to petitioner, "have uniformly held that the work of maintenance employees of multi-tenanted office buildings is not covered by the Act" (Pet. Br., pp. 12-15). The fact is that almost without exception, all of these decisions were based entirely upon the holding that building service employees are not "engaged in commerce" although the tenants in the building serviced are so engaged, following the rationale of this Court in *McLeod v. Threlkeld*, 319 U. S. 491. In the course of the opinion in most of the appellate decisions relied on by petitioner, the court usually made clear that it had to pass upon no contention that the employees were engaged in occupations necessary to production of goods for commerce, nor did the holding reach so far.⁴⁶ In the one or two cases where reference was made to the question of production, the court appears to have not had before it the arguments here set forth and to have further bottomed its decision upon the insubstantial character of the evidence as to the activities of the tenants in question, or the considerable number of tenants renting space as executive offices in connection with manufacturing or mining conducted at plants elsewhere; there was undue reliance also upon a too literal interpretation of the words "close and immediate" in the opinion in *Kirschbaum v. Walling*, substituted as a test for the language of the statute itself.⁴⁷

⁴⁶ *Johnson v. Dallas Downtown Development Co.*, 132 F. (2d) 287 (C. C. A. 5) cert. den. 318 U. S. 790; *Stoike v. First National Bank of N. Y.*, 290 N. Y. 195 (Ct. App. N. Y.) cert. den. 320 U. S. 762; *Tate v. Empire Bldg. Corp.*, 135 F. (2d) 743 (C. C. A. 6) affg., per curiam, 2 Wage Hour Cases, 472 (W. D. Tenn.) cert. den. 320 U. S. 766; *Rosenberg v. Semeria, et al.*, 137 F. (2d) 742 (C. C. A. 9) cert. den. 320 U. S. 770; *Convey v. Omaha National Bank*, 140 F. (2d) 640 (C. C. A. 8) cert. den. 321 U. S. 781; *Lofther v. First National Bank*, 138 F. (2d) 299 (C. C. A. 7, 1943).

⁴⁷ *Johnson v. Masonic Bldg. Co.*, 138 F. (2d) 817 (C. C. A. 5) cert. den. 321 U. S. 780; *Rucker v. First National Bank of Miami, Okla.*, 138 F. (2d) 699 (C. C. A. 10) cert. den. 321 U. S. 769. In the *Johnson* case the court remarked that "as the record stands after settlement thereof * * * there is no evidence that any goods are produced for commerce in the building itself." In the *Rucker* case the court noted that "it is not shown on this record whether any of the goods were produced in the building" and concluded that "under these facts" it could not be said that the maintenance employees were necessary to production.

Petitioner makes similar reliance (Pet. Br., pp. 12, 13, 21, 26, 30).

The shortest answer to petitioner's principal contention is the recent warning to bench and bar in *Armour & Co. v. Wantock*, 323 U. S. 126:

If some of the phrases quoted from previous decisions describe a higher degree of essentiality than these respondents can show, it must be observed that they were all uttered in cases in which the employees were held to be within the Act. A holding that a process or occupation described as "indispensable" or "vital" is one "necessary" within the Act cannot be read as an authority that all which cannot be so described are out of it. *McLeod v. Threlkeld*, 319 U. S. 491, which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce", and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce.

Reference to the employees' activities in *Kirschbaum v. Walling* as so closely tied to production as to be "an essential part of it" states the standard in more exacting terms than the word "necessary" here requires.

The trial court having found respondents' duties were performed to enable the various tenants to conduct their activities conveniently and efficiently and that the tenants regularly had use of the facilities provided and derived the intended benefit, respondents were clearly necessary to production of goods for commerce by the tenants.

10. A substantial number of tenants at 10 East 40th Street being thus constantly engaged in the "production of goods for commerce" within the meaning of the Act, the elevator operators, porters, watchmen, mechanics and other

building maintenance and service employees operating the cars taking them to and from work every day, keeping habitable the quarters where they carried on their daily activities, preserving their property from fire and theft, providing the essential light and heat and maintaining the premises in a decent state of repair likewise came within the Act's scope. *Kirschbaum v. Walling*, 316 U. S. 517; *Walton v. Southern Package Corp.*, 320 U. S. 540; *Armour & Co. v. Wantock*, 323 U. S. 126. Not only were the duties performed and facilities served by such employees useful adjuncts of the work of the tenants performed, as found by the trial court, to enable them "to conduct their activities conveniently and efficiently", but such services were indispensable in the sense that tenants could not carry on their businesses in a 48-story building without them.⁴⁸ Nor does the fact that respondents were employed by the building owner and not by any of the tenants, in which the facts here differ from the *Borden* case, insulate them from the protection of the Act (compare *Pet. Br.*, p. 4). *Kirschbaum v. Walling*, 316 U. S. 517; *Walling v. Sondock*, 132 F. (2d) 77 (C. C. A. 5, 1942), cert. den. 318 U. S. 772.

II.

Respondents were engaged in interstate commerce within the meaning of the Act.

We understand it to be undisputed by petitioner that a substantial number of tenants, occupying a substantial portion of the rentable area of the 10 East 40th Street

⁴⁸ It has been stipulated that in all of these activities the tenants have "regularly and continuously had the benefit of and made use of the facilities" supplied by the building service employees (Pl. Ex. 1, pars. 6-7; R. 308-309). And the trial court found that "the labor of defendant's building service employees has been performed . . . to enable the various tenants to conduct their activities conveniently and efficiently" and the various tenants "regularly and continuously had use of and derived the intended benefit from the various facilities so provided (finding 11, R. 317).

building, was there regularly and continuously engaged in business activities constituting interstate commerce within the Act's definition in Section 3 (b).⁴⁹ In this category would come, in addition to the manufacturing, mining, publishing, advertising and publicity concerns and the sales agents, whose work has been discussed at length above, those tenants in the export and import, construction and engineering, financial and related businesses, and the United States Government. Not without deference for the weight of authority among lower and intermediate courts which reject the argument, we nevertheless urge that the activities of respondents here were so closely related to commerce as conducted in the building by the various tenants as to be deemed an essential part thereof and to bring these employees within the Act's coverage.

We urge further that the very activities above outlined which constitute "production for commerce" as performed by the various tenants in the 10 East 40th Street building, also point to the conclusion that the building is virtually a composite instrumentality of interstate commerce. The work of respondents has been found by the trial court to have been "performed . . . to enable the various tenants to conduct their activities conveniently and efficiently" and the tenants "regularly and continuously had use of and derived the intended benefit from the various facilities so provided" (finding 11, R. 317). It follows that respondents, in protecting the building from fire, theft and other damage, keeping it clean, and providing heat and other necessary comforts, were so closely related to maintenance and operation of an essential instru-

⁴⁹ In any event, this fact would appear to be established by stipulation of the parties (Pl. Ex. 1, par. 9; R. 309). And see *Electric Bond & Share Co. v. S. E. C.*, 303 U. S. 419; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 106-107. See also *Cudahy Packing Co. v. Bazanos*, 245 Ala. 43, 15 So. (2d) 720 (Sup. Ct. Ala. 1943); *McMillan v. Wilson & Co.*, 212 Minn. 142, 2 N. W. (2d) 838 (Sup. Ct. Minn. 1942); *Horton v. Wilson & Co.*, 223 N. C. 71, 23 S. E. (2d) 437 (Sup. Ct. N. C. 1943); *Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5, 1942), *affd.* 317 U. S. 564.

ment of commerce as to be deemed a part of such commerce as conducted in the building and to entitle them to the benefits of the Act. *Overstreet v. North Shore Development Co.*, 318 U. S. 125 (1943); *Slover v. Wathen*, 140 F. (2d) 238 (C. C. A. 4, 1944). Each case must be determined upon its own facts. See *Burton v. Zimmerman*, 131 F. (2d) 377 (C. C. A. 4, 1942).

There must be considered finally the fact that certain of the tenants used the building facilities, such as the freight elevators, to acquire goods from out-of-state sources or to ship such goods out across state lines.⁵⁰ As the Third Circuit observed in *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3, 1941), elevator operators under such circumstances "are also directly engaged in commerce, for although their activities take place entirely within the state, they carry out one step in the actual transportation of the goods to points outside the State." In affirming this decision, this Court agreed that the building elevators "start and finish the interstate journeys of goods going from and coming to the tenants." *Kirschbaum v. Walling*, 316 U. S. 517, 519. See also *Walling v. Sondock*, 132 F. (2d) 77 (C. C. A. 5, 1942) cert. den. 318 U. S. 772; *Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5, 1942), aff'd 317 U. S. 564; *Fleming v. American Stores Co.*, 42 F. Supp. 511, 524, aff'd 133 F. (2d) 840 (C. C. A. 3, 1943), indicating the same result as to watchmen and other maintenance workers.

Accordingly, respondents, who so served these tenants regularly and continuously (finding 11, R. 317), were engaged not only in "production for commerce" but also in "commerce."

⁵⁰ See references above, pages 13, 15, 17, 18, 26, 29-33; finding 10 (R. 316).

III.

Respondents' functions here met the test of substantiality.

There remains to be considered the question of whether the work of respondents here met the test of substantiality. If their functions are deemed to be so closely related to "commerce" as conducted by the tenants as to be a part thereof, there is some authority to the effect that no test of substantiality applies. *Schmidt v. Peoples Tel. Co. of Maryville*, 138 F. (2d) 13 (C. C. A. 8, 1943); *North Shore Corp. v. Barnett*, 143 F. (2d) 172 (C. C. A. 5, 1944). In cases involving "production of goods for commerce" on the other hand this Court has suggested a test of substantiality without defining its confines. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572; *Walton v. So. Package Corp.*, 320 U. S. 540.

We may start with the observation of the Administrator of the Wage and Hour Division, charged with the Act's enforcement, that:

In view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings, until the courts indicate that the Act applies or until further notice, the Division will take no further enforcement action under the wage and hour provisions of the Fair Labor Standards Act *with respect to maintenance employees in buildings in which less than 20 per cent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce.* [Italics added.]

Release No. P. R.-19, Nov. 19, 1943, 6 Wage Hour Rept. 1121, cited by the Second Circuit in its opinion in this case, 146 F. (2d) 433, 440.

It must be noted from the outset that (1) this statement is not an official interpretation of the Act's application, but merely expresses to the public the Administrator's position with respect to enforcement proceedings against employers; (2) the release includes specific reference to the fact that the test there adopted for enforcement purposes is not to be construed as curtailing in any way the independent right of employees to establish some other test of substantiality in private wage suits maintained under Section 16(b), such as the case at bar; (3) the present case was pending prior to the Administrator's adoption of the 20% rule of thumb (R. 1). In any event the requirements of the 20% test have been met in this case, if it is to be applied, as found by the Circuit Court here. 146 F. (2d) 438, 440.

The test of substantiality is not one "of mathematical precision". [*Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875, 879 (S. D. N. Y. 1943).] The Administrator of the Wage and Hour Division has expressed publicly, since an early date in the Act's enforcement, the opinion that

There is no justification for determining the applicability of the Act to a particular employee on the basis of the percentage of the goods he produces . . . which move in interstate commerce. . . . Thus, if in any workweek an employee produces goods for commerce and also produces goods for local consumption and performs work otherwise outside the coverage of the Act, the employee is entitled to both the wage and hour benefits of the Act for all the time worked during that week. The proportion of the employee's time spent in each type of work is not material. An employee spending any part of a workweek producing goods for commerce will be considered on exactly the same basis as an employee engaged exclusively in producing goods for commerce during the workweek and the total number of hours which the employee works during the work-

week at both types of work must be compensated for in accordance with the minimum wage and maximum hour standards of the Act.

Wage and Hour Division, U. S. Dept. of Labor, Interpretative Bulletin No. 5, par. 9, originally issued Dec. 2, 1938, 1942 Wage Hour Manual, pp. 27-28.

This interpretation involving "contemporaneous construction of a statute by the men charged with responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" is "entitled to great weight". *U. S. v. American Trucking Assn.*, 310 U. S. 534, 549, citing *Norwegian Nitrogen Products Co. v. U. S.*, 288 U. S. 294.

Further, not only were the individual activities of the various tenants substantial here in relation to volume of goods ultimately shipped in commerce both from the building and from out-of-state mines, mills and plants, but a substantial portion of the entire space in the building was occupied by tenants regularly and continuously engaged in "production of goods for commerce." But petitioner would urge that a portion of these activities was not substantial as compared with the entire volume of business in the building (Pet. Br., pp. 5, 13, 28-30).^{*} The fact is that a large number of tenants served by respondents produced goods for commerce in what has been conceded throughout the record to be substantial volume. These tenants were scattered throughout the building.

Nor may we ignore the practical aspect of "skyscraper" building such as that here involved: their extension vertically rather than horizontally enables the valuable realty of congested metropolitan areas to be utilized upon an economically sound basis. The net effect on commerce of shipments of a regular and continuous nature initiated by the activities of the various tenants in this building was

^{*} But see note 30a above and compare references there set forth.

not less than if each tenant occupied a separate building and each of the buildings so occupied were served by these same maintenance workers; the effect in fact is more, for the tenants are here assembled together and the services rendered to them are rendered indiscriminately to all at the same time. (See findings 10-11, R. 316-317.)

In cases where, as here, interstate and intrastate activities are indiscriminately commingled and there is no segregation as between such activities, the courts are in virtual agreement that an employee is entitled to the benefits of the Act without a balancing of percentages with mathematical precision between work covered by the Act and work not so covered. Compare *A. H. Phillips, Inc. v. Walling*, No. 608, decided Mar. 26, 1945; *U. S. v. Darby*, 312 U. S. 100, 117, 118; *Baltimore & Ohio R. R. Co. v. I. C. C.*, 221 U. S. 612, 619. And see *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 341 (C. C. A. 8, 1944); *Colbeck v. Dairyland Creamery Co.*, S. D.

N. W., 8 Wage Hour Rept. 155, 9 Labor Cases par. 62,534 (Sup. Ct. S. D. 1945); *Guess v. Montague*, 140 F. (2d) 500, 504 (C. C. A. 4, 1933); *Walling v. New Orleans Private Patrol Service*, 57 F. Supp. 143 (E. D. La. 1943); *Fleming v. Knox*, 42 F. Supp. 948 (N. D. Ga. 1941); *Walling v. West Kentucky Coal Co.*, 8 Wage Hour Rept. 179, 9 Labor Cases par. 62,621 (W. D. Tenn. 1944); *Holland v. Amoskeag Machine Co.*, 44 F. Supp. 884 (D. N. H. 1943); *Walling v. Fox Detective Agency*, 7 Wage Hour Rept. 552, 8 Labor Cases, par. 62,219 (W. D. Tenn. 1944).

Finally, any necessary test of substantiality would appear to be met here under the authority of the many decisions indicating that application of the Act does not depend upon the percentage or volume of goods moving in commerce to which employee's activities specifically relate. It is sufficient if the record indicates that the flow is not casual, sporadic or utterly inconsequential. See *Walling v. Peoples Packing Co.*, 132 F. (2d) 236, 240 (C. C. A. 10,

1943) cert. den. 318 U. S. 774; *Schmidt v. People Tel. Union*, 138 F. (2d) 13, 15 (C. C. A. 8, 1943); *Davis v. Goodman Lumber Co.*, 133 F. (2d) 52, 53 (C. C. A. 4, 1943); *New Mexico Public Service Co. v. Engel*, 145 F. (2d) 636, 640 (C. C. A. 10, 1944); *Sun Pub. Co. v. Walling*, 140 F. (2d) 445, 448 (C. C. A. 6, 1944) cert. den. 322 U. S. 728; *Crompton v. Baker*, 220 N. C. 52, 165 S. E. (2d) 471 (Sup. Ct. N. C. 1941); *Sykes v. Lochmann*, 156 Kan. 223, 132 Pac. (2d) 620 (Sup. Ct. Kan. 1943).

The volume of business in commerce and production for commerce to which the work of these respondents immediately related was "more than that to which courts would apply the maxim *de minimis*." *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 607; see also *Santa Cruz Packing Co. v. N. L. R. B.*, 303 U. S. 453, 467; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 91; *Elewing v. Jacksonville Paper Co.*, 128 F. (2d) 395, 397-398, *affd.* 317 U. S. 564, 571-572.

CONCLUSION.

The judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

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APPENDIX

TABLE I.

**Space Occupied by Manufacturing and Mining Companies
in 10 E. 40th St. Building.**

<i>Room or Floor</i>	<i>Name</i>	<i>Sq. ft. Occupied</i>	<i>Record Reference</i>
3302	Ames Bag Machine Co.	300	R. 228
3110	Arkell Safety Bag Co.	2,400	R. 183
3100	Beechnut Packing Company ..	2,690	R. 97
1903	Blackinton & Co.	980	R. 193
44th- 48th	Chase Brass & Copper Com- pany	12,155	R. 196
3201	Cherokee Spinning Company ..	770	R. 137
17th	Cluett Peabody & Company ...	6,415	R. 234
1801	Cluett Peabody & Company ...	3,595	
2510	Domestic Concentrates Inc. ...	200	R. 53
3504	J. H. Dunning Corp.	1,100	R. 161
2205	Eastman Kodak Company	2,500	R. 60, 74, 83
4010	Eastman Kodak Company	1,950	
	Thomas A. Edison Co. Inc.		
710	(Ediphone Division)	2,500	R. 112
2501	(Export Division)	2,300	R. 112, 124
	Forbes Lithograph Mfg. Co.		
2203	(Philadelphia Division)	1,100	R. 18-9, R. 56-7.
3003	(New York Division)	2,260	R. 18-9, R. 56-7.
1907	General Motors Co. (Cleveland Diesel Engine Division)	2,140	R. 61
2105	Perolin Company of New York	1,450	R. 209
2003	Perolin Company of New York	540	R. 209
1401	Standard Magazines, Inc.	5,700	R. 285
3600	Tennessee Eastman Corp.	920	R. 64
2007	United Feldspar Minerals Corp.	980	R. 248
1501	Vanity Fair Mills	6,415	R. 165
2308	S. S. White Dental Mfg. Co. (Industrial Division)	1,510	R. 175

Total Square Feet Occupied 60,570

TABLE II.

Space Occupied by Advertising, Publicity and Trade Organizations in 10 E. 40th St. Building.

<i>Room or Floor</i>	<i>Name</i>	<i>Sq. ft. Occupied</i>	<i>Record Reference</i>
1904	Allied Liquor Industries	1,500	R. 245
3307	American Investors Union	1,430	R. 261
3705	Business Organizations Inc.	3,570	R. 83
38th	Carl Byoir & Associates	4,735	R. 83
2508	Carl Byoir & Associates	715	R. 83
2905	George E. Hatch	875	R. 103
4310	Textile Economics Bureau	965	R. 292
2701	Textile Research Institute	770	R. 190
4402	Textile Surveys	270	R. 294
4105	Willis L. Towne	475	R. 134
3703	John F. Yewell	215	R. 202

Total Square Feet Occupied 15,520

TABLE II-a.

**Space Occupied by Advertising, Publicity and Editorial
Offices of Manufacturers in 10 E. 40th Street Building.**

<i>Room or Floor</i>	<i>Name</i>	<i>Sq. ft. Occupied</i>	<i>Record Reference.</i>	<i>Activities Discussed* Resp. Br., page</i>
3110	Arkell Safety Bag Co.	2,400	R. 183	23
1301	Beechnut Packing Company	2,690	R. 97	15-16
17th	Cluett Peabody & Co.	6,415	R. 234	24-26
1801	Cluett Peabody & Co.	3,595	R. 234	24-26
2205	Eastman Kodak Com- pany	2,500	R. 69	14-15
4010	Eastman Kodak Com- pany	1,950	R. 74, 83	14-15
	Forbes Lithograph Mfg. Co.			
3003	(New York Division)	2,260	R. 18-9, R. 56-7.	11-14
2203	(Philadelphia Divi- sion)	1,100	R. 18-9, R. 56-7.	11-14
2105	Perolin Co. of New York	1,450	R. 209	16-17
2003	Perolin Co. of New York	540	R. 209	16-17
1401	Standard Magazines Inc.	5,700	R. 285	27
1501	Vanity Fair Mills ...	6,415	R. 165	21
Total Square Feet Occupied		37,015		

* Advertising, publicity and editorial activities of this group discussed in full at pages indicated. See record references at such pages above. See also summary of these activities, page 54, of the brief. These activities are among those conducted in offices of manufacturers already included in Table I.

TABLE III.

**Space Occupied by Manufacturers' and Mine Sales Agents
in 10 E. 40th St. Building.**

<i>Room or Floor</i>	<i>Name</i>	<i>Sq. ft. Occupied</i>	<i>Record Reference</i>
3207	Birmingham & Prosser Co.	650	R. 252-3
4500	D'Art Craftsmen	100	R. 213-4
4202	E. Kelly Downey	260	R. 108
2310	James Barr & Company	1,010	R. 302
4409	Chemical Marketing Co.	695	R. 301
2408	City Industrial Corp.	890	R. 302
3702	Dusenbury & Dusenbury	215	R. 301
2409	Federal Seaboard Terra-Cotta Corp.	550	R. 301
1608	Kane Import Company	1,030	R. 302
1605	J. E. Langsdorf Co. Inc.	1,400	R. 302
2803	National Products Refining Co. -	900	R. 301
3209	New York Textile Plants	1,120	R. 302
3008	Periodical Publishers' Associa- tion	1,850	R. 302
4106	Stanley Fullwood	245	R. 200-1
3406	Stanley Lowen	240	R. 290
2607	Stewart-Allen Company	1,100	R. 230
39th 40th	A. M. Tenney Associates	9,470	R. 116

Total Square Feet Occupied 21,725

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 820/

10 EAST 40TH STREET BUILDING, INC., PETITIONER.

v.

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR L. METCALFE WALLING, ADMINISTRATOR OF
THE WAGE AND HOUR DIVISION, UNITED STATES
DEPARTMENT OF LABOR, AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (R. 312-321) is reported in 51 F. Supp. 528. The opinion of the circuit court of appeals (R. 339-343) is reported in 146 F. 2d 438.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 27, 1944. The petition for a writ of certiorari was filed on January 6, 1945, and was granted on February 12, 1945 (R.

346). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

This case, like its companion case, *Borden Company v. Borella*, No. 688, this Term, presents the question whether the Fair Labor Standards Act affords coverage to the maintenance employees of an office building occupied to a substantial extent by the executive and administrative personnel of concerns engaged in the production of goods for interstate commerce, but conducting the physical processes of manufacture or mining elsewhere than in the building. As in the *Borden* case, the building also houses tenants engaged in preparing in the building advertising copy, circulars and publicity materials for distribution in interstate commerce. This case differs from the *Borden* case in that the building involved here is not primarily devoted to the production

Portions of the building are also occupied by the sales offices or agencies of firms engaged elsewhere in manufacturing or mining. As indicated below, p. 19, we believe that at least in some circumstances, selling and marketing activities may properly be regarded as constituting the "production of goods" within the meaning of the Fair Labor Standards Act, but we do not here urge that the decision below be affirmed on this ground. We disagree with petitioner's assertion (Br. 9-10) that "the chief questions for determination herein are whether selling constitutes 'production of goods for commerce' and whether maintenance workers are 'necessary' to such 'production'".

business of any single concern, and in that the building is not owned or operated by any of the firms engaged—as we contend—in the production of goods in the building.

STATUTORY PROVISIONS INVOLVED

Section 7 of the Act (52 Stat. 1060, 29 U. S. C. 201 et seq.) requires payment of overtime compensation to employees “engaged in commerce or in the production of goods for commerce.” Section 3 (j) of the Act defines “produced” and “production of goods” as follows:

Sec. 3 (j): “Produced” means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

STATEMENT

Since respondents’ brief reviews in detail (pp. 6–35) the findings and evidence, this statement is confined to a summary of the significant facts underlying the differences between petitioner’s and our view of the case.

Respondents are maintenance employees (elevator operators, porters, night watchmen, mechan-

ies, handymen, etc.) in petitioner's forty-eight-story multi-tenant building at 10 East 40th Street in New York City (R. 310-311, 313). The district court found that "executive and sales offices of 20 concerns, carrying on elsewhere the business of manufacturing and mining," occupied 25.8% of the rentable area, that "offices of sales agencies representing 17 manufacturers and mining concerns, carrying on elsewhere the business of manufacturing and mining," occupied 9.3% of the rentable area, and that "10 advertising agents and publicity and trade organizations" occupied 6.6% of the rentable area (R. 313-314, 334).² The remainder of the space was occupied by miscellaneous tenants not here claimed to have been engaged in the production of goods for commerce (see R. 313-314). The district court classified the "executive and sales offices" separately from the "offices of sales agencies" (R. 313). It found that the offices in the former class (described as "Class 1") were used for "executive and administrative activities, for conferences, and for taking orders for substantial quantities of merchandise * * *", and also in some instances for

² The findings of fact originally related these figures to percentages of the *rented* area (R. 313-314), but were corrected by stipulation of the parties (R. 334). The percentages of *rented* area are given in the opinion of the circuit court of appeals (R. 342-343) as about 29% for the executive and administrative offices, about 7.5% for the advertising, publicity and trade organizations, and about 10.5% for the sales agencies.

advertising and publicity work; whereas offices of the latter type (Class 2) were purely sales agencies (R. 314). The circuit court of appeals adopted the district court's classification and pointed out that the space occupied by "the management groups" (Class 1) plus the space occupied by the publicity concerns (Class 5), "which design a substantial part of the advertising material, lithographed and printed matter, etc., which are shipped in interstate commerce" (R. 342), amounted to a total of 32.5% of the rentable area and 36.5% of the rented area.

Petitioner seeks to minimize these findings of fact by a breakdown of the 20 concerns included by the courts below in Class 1, the "management" or "executive" group (Br. 8). It asserts that "approximately half the total space occupied by this class * * * were purely sales offices" and that only six of the 20 concerns, occupying only 5.1% of the rentable area of the building, "had anything to do with actual production" (*ibid.*). These assertions are not only contrary to the findings of fact, but also are not supported by the evidence in the record. While the offices in this group were used for selling purposes, they were also used for direct management and control of the physical manufacturing at the outside factories.

Petitioner apparently concedes that the activities carried on in the building by the Forbes Lithograph Company, the Arkell Safety Bag Co.,

the Cherokee Spining Co., Standard Magazines, Inc., Domestic Concentrates, Inc., and the Ediphone Division of the Thomas A. Edison Co. have something "to do with actual production."³ The Forbes Lithograph Company, which has a factory at Chelsea, Massachusetts, prepares the lithograph designs, posters, and window and counter displays in its New York office and then sends them to the Chelsea plant for reproduction (R. 31, 43, 50-53). The creative art work, lettering, designs of pictures and design ideas for window displays and posters are prepared in the New York office under the supervision of the company's art director (R. 42-43). The "layout instructions, size of the type and all the items and details concerning the piece which is ultimately to be manufactured" are prepared by the art director in the New York office (R. 38), and he regularly uses the teletype to communicate instructions "with regard to the size or the color of the outline or anything else in regard to the actual production of the items" which are physically manufactured at the plant in Chelsea, Massachusetts (R. 51-52).

The Arkell Safety Bag Company, which has factories in Brooklyn and Chicago engaged in the business of manufacturing safety bags as linings for bags, barrels or boxes, maintains its executive

³ These are the "remaining six tenants" of the building which are referred to but not identified by name at p. 8 of petitioner's brief.

and administrative offices in this building (R. 182-183). Both its president and its vice-president are located there (R. 185). Its purchasing department, which is in the building, purchases all raw materials and equipment for the factories (R. 188-189). The New York office also handles insurance for plant equipment, traffic arrangement, and all finance and advertising matters (R. 185-188).

The Cherokee Spinning Company, which has a factory in Knoxville, Tennessee, uses its office in New York both as a sales office and for the styling of handkerchiefs, the designs and sketches of which are sent to the mills (R. 138, 142-143).

Standard Magazines, Inc., publisher of sixty general and fiction magazines with an aggregate circulation of between 32 and 35 million copies, occupies two-thirds of one floor (R. 285, 287). It maintains its main office, including editorial, business and sales departments, in the building (R. 286). The editorial departments perform the usual functions of selecting, editing and correcting manuscripts, preparing layouts, and proof-reading (*ibid.*). The purchasing of the paper for the magazines is also done by this office, although the printing is done at four outside plants located in New York, Illinois, New Jersey and Connecticut (R. 286-287).

Domestic Concentrates, Inc., which manufactures food flavors, has a plant in the factory dis-

trict of New York. Its executive offices at 10 East 40th Street are used not only for carrying on the "office detail", but for supervision of the factory operations, and from them "instructions to the factory with relationship to production" are regularly issued (R. 155-156). The office maintains "daily, frequent contact with the factory" (R. 156).

The New York office of the Ediphone Division of the Thomas A. Edison Company receives and handles daily a great number of parts for Ediphone machines (R. 113). Repair work on machines is also done on these premises, as well as the packing and shipping of machines to customers located outside of New York (R. 114-115). This office also receives and ships back to the factory for scrap old obsolete machines, and it maintains daily communication with the New Jersey factory, principally by direct wire. (R. 115).

There is ample evidence in the record to show that most of the others of the twenty concerns are engaged in the building in similar productive processes closely integrated with the physical manufacturing processes carried on in their outside factories. Among the offices which, according to petitioner (Br. 8), do not have "anything to do with actual production" are included, for example, Cluett, Peabody & Company, United Feldspar Minerals Corporation, Beechnut Packing Company, and Eastman Kodak Company.

The record shows that the New York office of each of these companies is engaged in managerial and administrative activities essential to the manufacturing processes carried on in the factories.

Cluett, Peabody & Company, which manufactures men's apparel at its factories, has its "headquarters" at 10 East 40th Street. From there the president¹ "guides the destiny of the company," establishes company policies, and "works with the vice-president in charge of each department" such as production, merchandising, market research, and advertising (R. 234, 237-238). Raw materials are purchased centrally by the New York office for the different factories, and patterns for cloth to be made into garments by the factories are designed here (R. 235-236). The advertising and display department, which is part of the New York office, originates ideas and plans for advertising in magazines, for displays, brochures and pamphlets, and for "market research reports" for the sales department. This material, though largely executed by outside agencies, must be approved and corrected by the advertising manager. (R. 239-240.)²

The New York office of United Feldspar Minerals Corporation communicates by correspondence with its mines or plants with respect to

¹ Cluett, Peabody & Company's main sales office is not in this building. It is located at 2 Park Avenue, New York City (R. 239).

"everything connected with the operation of the plants", including production going on at the plants (R. 249). Both the president and the executive vice-president, who "run[s] the corporation", maintain their offices in the building (R. 248-249).

Eastman Kodak Company produces substantial quantities of written and photographic matter on its premises at 10 East 40th Street (R. 69-71). The advertising and publicity work, including photography and copywriting, is designed to publicize the uses of the products made by Eastman Kodak Company and its subsidiary, Tennessee Eastman Corporation (R. 75-76). Eastman Kodak Company maintains a photographic studio and laboratory on the premises for making and printing the photographs, and the copy is also written here. The pictures and releases are sent several times a week throughout the country to newspapers, magazines, and press services such as the Associated Press. (R. 76.)

The Beech-Nut Packing Company, which has food products and confections factories at Canajoharie, Rochester, and Brooklyn, uses its offices at 10 East 40th Street largely for advertising functions, including the creation of advertising ideas, and dealings with publishers and representatives of radio stations (R. 96-98, 100-101). The offices of the president of the company and of the sales manager of the food division are also

located there, and constant communication between the office of the president and the plant at Canajoharie is maintained by direct telephone wire (R. 99).

Among the offices which petitioner describes as "purely sales offices" are those of such companies as J. H. Dunning Corporation and the S. S. White Dental Manufacturing Company. Yet J. H. Dunning Corporation, which is engaged in the business of manufacturing wooden boxes and box shooks with several factories located in different places (R. 161-162), maintains the office of its president in this building. The president is "in constant contact" with the various factories (R. 163). "They [the factories] don't blow a whistle without his approval or sanction," and that includes "blowing the whistle regarding production in these various factories" (R. 163). "Everybody takes his orders from 10 East 40th Street" (R. 164). The office is connected by teletype with all the factories (*ibid.*). The S. S. White Dental Manufacturing Company's office in this building also maintains a close connection with the company's plant in Staten Island, where flexible shafting for industrial uses is manufactured (R. 175-176). The "sales engineers" located in the office draft the designs and specifications for the shafting needed by customers, and these designs and specifications are sent to the factory which produces the article "directly pur-

suant to [such] design[s]" (R. 179). The office is in direct communication with the factory through a teletype machine (R. 177). The same type of integration between office and factory was similarly proved with respect to the other concerns included by the courts below in the "management group," with the possible exception of four of the companies.⁵ Even if these four companies are excluded from the group, the percentage of space occupied by the other sixteen tenants in Class 1 is 19.81% of the total rentable area and 22.26% of the rented area in the building.⁶

The evidence regarding the Chase Brass and Copper Company, Blackington & Company, the Export Division of the Thomas A. Edison Company, and the Tennessee Eastman Corporation is deficient in this respect (R. 197, 193, 124, 64). These four companies occupy 12,155, 980, 2500, and 920 square feet, respectively (R. 196, 193, 112, 124, 64).

The total rentable area in the building is 234,245 square feet and the rented area is approximately 208,478 square feet (R. 313). The following table shows the space occupied by the sixteen tenants who carry on management activities closely integrated with their manufacturing elsewhere:

Farbes Lithograph Co.	3,360 sq. ft. (R. 56)
Albert, Penbolly & Co.	10,010 sq. ft. (R. 234)
Standard Magazines, Inc.	5,700 sq. ft. (R. 285)
J. H. Dunning Corp.	1,400 sq. ft. (R. 161)
S. S. White Dental Mfg. Co.	1,510 sq. ft. (R. 175)
Arkell Safety Bag Co.	2,510 sq. ft. (R. 183)
United Feldspar Minerals Corp.	580 sq. ft. (R. 248)
Eastman Kodak Co.	4,450 sq. ft. (R. 69, 83)
Family Fair Mills	6,415 sq. ft. (R. 165)
Ames Bag Co.	300 sq. ft. (R. 228)
Percolin Co.	1,900 sq. ft. (R. 209)
Beech Nut Packing Co.	2,600 sq. ft. (R. 97)
Cherokee Spinning Co.	770 sq. ft. (R. 137)
Domestic Concentrates, Inc.	200 sq. ft. (R. 153)

The advertising, publicity and trade organizations, occupying 7.5% of the rented and 6.6% of the rentable area in the building, carry on publicity, copywriting and editorial work which is intended for national circulation. Carl Byoir & Associates, public relations counsel to a number of large companies such as the Aluminum Company of America, Libby-Owens Company and the Pullman Company, employ copy writers and photographers at their 10 East 40th Street offices to produce newspaper releases, magazine and feature articles, radio scripts and photographs (R. 89-91, 93-95).⁷ Between 15,000 and 20,000 pages of releases and copy are mimeographed on the premises each week, 90% of which are sent outside of New York State to different groups, including 17,000 newspapers (R. 93-94, 85, 92). Other tenants engaged in publicity and advertising work prepare advertising for industrial and technical clients, including preparation of copy, layouts, booklets and direct mail advertising for

General Motors Inc. (Cleveland Diesel Engine Division)	2,140 sq. ft. (R. 61)
Thomas A. Edison Company (Ediphone Div.)	2,300 sq. ft. (R. 112)
Total	46,425 sq. ft.

The total space occupied by the "manager" out group" (including the space occupied by the four tenants named in fn. 5, *supra*) is 62,980 square feet, more than 2,000 feet greater than the figure given by petitioner (Br. 8).

⁷ An affiliated organization handles the Atlantic & Pacific Tea Company account exclusively (R. 95).

out-of-State circulation (R. 103-104, 134-136). Several monthly magazines on technical subjects are also prepared, though not printed, in this building for interstate distribution. They include "Textile Research," published by the Textile Research Institute, "Your Investments," published by the American Investors' Union, "Rayon Organon," published by the Textile Economic Bureau, and a weekly publication of the Allied Liquor Industry (R. 190-191, 262, 292, 247).

If the space occupied by these advertising and publicity organizations is added to the space occupied by the executive or management group of tenants, the total is well over 25% of either the rentable or the rented area in the building.

The district court's findings of fact establish that the work of the maintenance employees bears a very close and direct relation to the activities of the above described tenants. The court not only found that these employees "performed the customary duties incident to the effective maintenance and operation of this office building," such as the furnishing of heat and hot water, keeping the elevators, radiators, water and fire sprinkler systems in repair, and operating the elevators; it found also that they engaged in "carrying advertising matter, publicity releases, photographic material, magazine layouts, commercial art drawings, printers' and lithographers' proofs, con-

struction plans and specifications, Diesel engine parts, Ediphone machines and parts, samples of merchandise, office furniture and equipment and supplies to and from tenants' premises" (Fdg. 10, R. 316). The district court further found that the labor of these building service employees "has been performed as a useful adjunct and a necessary incident to the successful and efficient operation of said office building and to enable the various tenants to conduct their activities conveniently and efficiently * * *" (Fdg. 11, R. 317).

The district court found, however, that the maintenance employees were not "substantially engaged in activities having a close or immediate tie with the production of goods of any kind" (R. 317), and that they were not engaged "in commerce." These findings were presumably predicated on the court's earlier findings that "no manufacturing of any kind" was carried on in the building by the executive, administrative and sales offices of manufacturing concerns, and that the space used by the advertising, publicity and trade organizations was "not substantial" in relation to the volume of business carried on in the building as a whole (R. 316).

The circuit court of appeals reversed (R. 339-343): It held that a substantial portion of the building was occupied by tenants engaged in the building in the production of goods for commerce,

and that the maintenance employees were engaged in occupations necessary to such production. This conclusion was premised on the grounds (1) that "persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the Act as to bring the service employees of the office building in which they are located under the coverage of the Act" (R. 341); (2) that the work of the publicity concerns on advertising material, lithographed and printed matter, etc., constituted production of goods for commerce (R. 342); and (3) that the sales agencies representing mining and manufacturing concerns were engaged in the production of goods because their activities in arranging the transfer of goods from one person to another constituted both "handling" and "transporting" such goods, and also because their activities were "economically necessary to the production of goods" (R. 342-343). The court commented that the 20% standard applied by the Administrator for enforcement purposes in cases like this was a "sensible one for the courts to adopt" in deciding whether a substantial portion of a building is devoted to the production of goods for commerce (R. 342).⁸ Since the space occupied by the

⁸ It is important to point out that the Administrator does not regard the 20% standard as a measure of what is "substantial" in the sense in which that word was used in *Walling*

"management group" and the publicity group totaled 32.5% of the rentable area and 36.5% of the rented area, and the additional space occupied by the sales agencies would bring the proportions to 42% and 48%; respectively, the court ruled that the maintenance employees were within the scope of the Act under the principles announced in its decision in *Borden Company v. Borella*.

y. Jacksonville Paper Co., 317 U. S. 564, at 572 (see pp. 29-31, *infra*). The decisions of the courts indicate that a much smaller proportion of interstate business may suffice to bring employees engaged in occupations necessary to such business within the scope of the Act. See *infra*, pp. 26-29. The court's statement that "the Wage and Hour Division has adopted a standard of 20%" refers to an announcement by the Administrator that "in view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings," he would take "no further enforcement action * * * with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce." See release of Wage and Hour Division, dated November 19, 1943, P. R.-19 (rev.). A copy of this release is printed as an appendix to this brief.

This release was not intended to represent the Administrator's official interpretation of the Act, but was simply a statement of enforcement policy pending further clarification by the courts. The application of a flat percentage rule would be consistent neither with the policy of the Act nor with the decisions of this Court. As more fully explained below (pp. 29-31), the selection of the 20% standard for enforcement purposes rests upon what seems to us a reasonable assumption that building maintenance employees will almost unavoidably devote a substantial part of their time to the production of goods for commerce if as much as 20% of the building is occupied by tenants engaged in such production.

SUMMARY OF ARGUMENT

Here, as in the *Borden* case, petitioner starts with the premise that the maintenance employees of a building cannot be "necessary to the production" of goods unless the physical processes of manufacture of such goods are carried on in the building (Br. 20). Petitioner argues further (Br. 13, 30-32) that the building must be "principally devoted" to such production, and attacks the 20% space standard applied by the court below. We believe that the relevant and controlling factors are (1) that the management activities of a production enterprise are as much a part of the "production of goods" for commerce as are the physical manufacturing processes; (2) that the test for determining coverage of the maintenance employees is not whether the building is "principally devoted" to production of goods for commerce but is whether a substantial part of the employees' time and duties are related to such production; and (3) that the facts in this record, not only with respect to the space occupied by tenants engaged in such production of goods for commerce but also with respect to the nature of the employees' duties, demonstrate that the maintenance employees unavoidably spend a substantial part of their time in work necessary to such production. The proportion of the building occupied by tenants engaged in production of goods for commerce is material only

insofar as it bears upon the question whether a substantial part of the employees' duties relates to production of goods for commerce. The 20% standard is not to be regarded as a conclusive test, but rather as a guide to assist in reaching a practical judgment on this question.

ARGUMENT.

RESPONDENTS ARE ENGAGED IN OCCUPATIONS "NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.

Introduction.—It is our view that the court below correctly held respondents to be covered by the Act. We think that its judgment should be upheld on the basis of the production activities of the "management group" and the publicity and advertising group of tenants, and that it is unnecessary to rely on the ground that the selling and marketing activities constitute "production of goods." Selling and marketing functions undoubtedly are necessary to production, and in some circumstances are as closely integrated with the physical manufacturing processes as are the executive and supervisory functions carried on by the offices classified by the courts below as the "management group." However, we do not believe that the determination of the instant case depends on this proposition.

⁹ For example, where the volume and kind of goods to be manufactured are directly determined by purchase orders or by sales forecasts, as appears to be the case with respect to a

A. THE ACTIVITIES CARRIED ON BY THE "MANAGEMENT" AND PUBLICITY GROUPS OF TENANTS CONSTITUTE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE ACT

As pointed out in our brief *amicus* in the *Borden* case (pp. 13-23), there is no basis in the Act or in the decisions of this Court for rigidly construing the term "production of goods" to mean only physical manufacturing processes. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 524; *Armour & Co. v. Wantock*, 323 U. S. 126, 129; *Walton v. Southern Package Corp.*, 320 U. S. 540. Management functions closely integrated with manufacturing processes are as much a part of the manufacturing and production processes as the physical making of the goods. Likewise, the writing and preparation of mimeographed, photographic and written materials such as pamphlets, magazine articles and advertising copy are as much production of goods as the manufacture of clothes, lumber and like commodities. In the instant case, as in the *Borden* case, both of these types of production of goods for commerce are carried on in the building which respondents maintain.

number of the production concerns which maintain sales agencies at 10 East 40th Street. See, e. g., as to purchase orders, R. 291 (Wheeling Stamping Company); R. 256 (Birmingham & Prosser Co., Inc.); R. 141 (Cherokee Spinning Company); R. 176-177 (S. S. White Dental Mfg. Co.); R. 40-41 (Forbes Lithograph Company); R. 66 (Tennessee Eastman Corp.); as to sales forecasts, R. 210 (Perolin Company); R. 170 (Vanity Fair Mills).

Although with respect to the management activities the instant case is more complex than the *Borden* case, the record here shows that many of the executive offices in this building are integrated with the operation of factories in much the same way as the Borden executive offices are integrated with the Borden factories. The main difference here is that the management activities are integrated with several businesses rather than with a single business; but, as shown by our summary of the evidence, *supra*, pp. 3-14, they are none the less integral parts of the several manufacturing and mining businesses. From a "practical" viewpoint the management activities of the tenants in this building constitute, as in the *Borden* case, "part of an integrated effort for the production of goods" (see *Armour & Co. v. Wantock*, 323 U. S. 126 at 130, and other cases cited in our brief in the *Borden* case, pp. 14, 18-20). Petitioner's "twice removed" argument (Br. 20), as more fully explained in our brief in the *Borden* case (pp. 18-19), gives unwarranted rigidity to the definition of "production" and obscures rather than clarifies the issue of what constitutes production within the meaning of the Act.¹⁰

¹⁰ The decisions of state and lower federal courts which, as petitioner contends, have held office building maintenance employees to be without the coverage of the Act have been discussed in our brief in the *Borden* case (pp. 23-26), and will not be reexamined here.

The physical production of "goods" such as magazine articles, mimeographed and photographic materials, and other advertising and publicity matter is more significant in the instant case than in the *Borden* case, because of the great quantities of such goods produced in the building here. For example, Carl Byoir & Associates, occupying one whole floor and part of another (R. 83), produce between 15,000 and 20,000 pages of mimeographed materials per week, 90 percent of which are sent outside the state (*supra*, p. 13). Standard Magazines, Inc., which occupies two-thirds of one floor (R. 285), produces 60 general and fiction magazines with a national circulation (*supra*, p. 7). Eastman Kodak Company, which occupies space on two floors (R. 69-71), likewise produces large quantities of written and photographic matter. Displays, brochures, and pamphlets are also produced by Cluett, Peabody & Company (*supra*, p. 9), by the Perolin Company (R. 211), and by the Forbes Lithograph Company (*supra*, p. 6). In addition, several monthly magazines on technical subjects are prepared in the building (*supra*, p. 14). There would appear to be no question, since this Court's decision in *The Western Union Telegraph Co. v. Lenroot*, No. 49, this Term, slip opinion, p. 9, that these magazine articles, pamphlets, photographs and like materials are "goods" and that the writing and preparation of them constitute "production

of goods" within the meaning of the Act (see our brief in the *Borden* case, p. 27).

Factually, this case differs from the *Borden* case in that in the latter the building was owned, operated and principally occupied by one company engaged in productive activities. However, the *Kirschbaum* decision shows that maintenance employees may be covered where their activities relate to production carried on by several different companies, and thus establishes that integration with the business of one particular company is not essential to establish the required "close and immediate tie" between the maintenance employees and production of goods for commerce. 316 U. S. at 525. The *Kirschbaum* case also indicates that the owner of the building which employs the maintenance employees need not itself be engaged in the production of goods for commerce; " * * * the provisions of the Act expressly make its application dependent upon the character of the employees' activities". *Id.*, at 524. If we are correct in our thesis that the activities carried on here, and in the *Borden Building*, constitute production within the meaning of the Act, the sole remaining question as to the controlling force of the *Kirschbaum* case lies in the difference in the proportion of space devoted to production. In the *Kirschbaum* case the tenants in both buildings were "principally engaged" in production; in *one* they were "for

the most part" manufacturers, and in the other "practically all" of them were similarly engaged.¹¹ The dominance of the Borden Company's activities in its own building may fairly be said to bring it into the same category. Here, the proportion of tenants engaged in production is less—on our theory more than 25% but on any theory less than 50%. Whether this difference of proportion is sufficient to take the case out of the *Kirschbaum* rule is considered under our next point.

B. THE AMOUNT OF SPACE OCCUPIED BY THE TENANTS ENGAGED IN PRODUCTION OF GOODS FOR COMMERCE IN THE BUILDING AND THE EVIDENCE REGARDING RESPONDENTS' DUTIES SHOW THAT RESPONDENTS ARE SUBSTANTIALLY ENGAGED IN OCCUPATIONS NECESSARY TO SUCH PRODUCTION.

This Court's decisions make it clear that an employee's duties, to fall within the Act, need not be entirely or principally devoted to commerce or to the production of goods for commerce. See *United States v. Darby*, 312 U. S. 100; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564.¹² It

¹¹ The opinion of the Court recites (316 U. S. at 518-519) that practically all the tenants "manufacture or buy and sell ladies' garments"; but the record in that case indicates that approximately 90% of the tenants were engaged in the physical manufacture of goods in the building.

¹² Congress, in enacting the Fair Labor Standards Act, "has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer." *United States v. Darby*, 312 U. S. at 123. Cf. *Connecticut Light and Power Co. v. Federal Power Commission*, No. 189, this Term, slip opinion, pp. 15-16. And see *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, where this Court held employees entitled to recover under the Act on the ground that "some of the oil produced ultimately found its way into interstate commerce" (317 U. S. at 91). "The court did not say how much, nor whether the amount made any difference" (*Berru v. 34 Irving Place*

suffices that "a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established

* * *." *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 at 572. In determining whether "a substantial part" of the duties of the employees in such a case as this relates to and is necessary to production, two questions have to be answered: (1) whether the proportion of production business carried on in the building is substantial; and (2) whether the proportion of the employees' activities which is necessary to such production business is substantial.

In the instant case, the first question answers the second. For there is neither assertion, evidence, nor finding that the activities of the employees are devoted to the business of particular tenants otherwise than in direct proportion to the office space which such tenants occupy. The findings of the district court establish that the labor of the maintenance employees "has been performed as a useful adjunct and a necessary incident to the successful and efficient operation of said office building and to enable the various tenants to conduct their activities conveniently and efficiently, and said tenants have regularly and continuously had use of and derived the intended benefit from the various facilities so provided" (R. 317). Under this finding, the tie between the work of the maintenance employees

and the business of the tenants, including the tenants engaged in production, cannot be any less "close and immediate" than was held to be the case in the *Kirschbaum* decision (316 U. S. at 525). If, therefore, the proportion of the production business carried on in the building is large enough to be "substantial", it must follow that the maintenance employees are likewise substantially engaged in occupations "necessary" to such production business. The question, then, is whether on the facts of this case the production business carried on in the building is substantial.

This is not an unusual problem under the Act. In most businesses engaged in commerce or in the production of goods for commerce, the employees work indiscriminately with relation to both interstate and intrastate transactions. See *United States v. Darby*, 312 U. S. 100, 117-118. The courts are virtually uniform in holding in such cases that an employee is within the protection of the Act if the interstate transactions to which his duties are necessary constitute a regular part of the business and are not inconsequential or sporadic. See *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8); *Sun Pub. Co. v. Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C. C. A. 10); *Davis v. Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4); *Muldowney v. Sea-*

berg Elevator Co., 39 F. Supp. 275 (E. D. N. Y.); *Strand v. Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.).¹³ None of the decisions holds that the business to which the employee's duties are necessary must be shown to be "principally devoted" to interstate transactions (cf. Pet. Br. 13-14). As was said in the *Engel* case, an employee's interstate activities are sufficiently substantial to bring him within the scope of the Act if such activities constitute "a part of the work-a-day duties of the employee," and his contribution to production for commerce is "both consistent and continuous," "not merely sporadic and isolated" (145 F. 2d at 640).

No reason appears why this principle should not apply to maintenance employees performing service indiscriminately for tenants who engage in production of goods for commerce and for tenants who do not. In all cases where the interstate and intrastate business is commingled, the problem is to determine whether the interstate aspects are substantial, or merely incidental and inconsequential. The problem here does not differ in substance from that of employees in a factory producing goods only a fraction of which is intended for shipment in interstate commerce. In such cases, while the proportion of goods

¹³ But compare *Super-Cold Southwest Co. v. McBride*, 124 F. 2d 90 (C. C. A. 5); *James V. Reuter v. Walling*, 137 F. 2d 315 (C. C. A. 5), reversed on other grounds, 321 U. S. 671.

shipped in commerce may be regarded as some indication of the substantiality of the employee's interstate activities, it is recognized that no flat percentage standard can be applied. In some cases the proportion of interstate business has been as low as a fraction of 1%,¹¹ but nevertheless has been held substantial enough to bring within the Act employees whose regular day-to-day duties relate

¹¹ See *Sun Pub. Co. v. Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728, holding the Act applicable to employees of a small newspaper shipping about 2% of its circulation out of the State; *Davis v. Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4), where the dollar volume of the goods shipped in interstate commerce was roughly 1.1% of the total sales; *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C. C. A. 10), holding the Act applicable to an engineer of an electric power company where 3.7% of the electricity produced was supplied to interstate businesses; *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8), where less than 1/6 of 1% of defendant company's revenue was derived from interstate calls and the number of such calls was "trifling" as compared with the total number; *Strand v. Garden Valley Telephone Co.*, 31 F. Supp. 898 (D. Minn.), holding the Act applicable where 4% of calls were interstate; *Muldorncy v. Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.), holding the Act applicable to employees of an elevator manufacturing and repair company whose interstate business amounted to only 3% of 1% of the company's total business. See also *Cooper v. Gas Corp. of Michigan*, 4 Wage Hour Rept. 550 (C. C. Mich., Mason Co., 1941), 58 100 of 1%; *Steger v. Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex., 1941), 1%; *Lewis v. Nail-ling*, 36 F. Supp. 187 (W. D. Tenn.), 1%; *Fleming v. Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), decision on appeal affirmed without opinion, 315 U. S. 784, under 2%; *Ling v. Currier Lumber Co.*, 50 F. Supp. 204 (E. D. Mich.) 2%.

indiscriminately to the interstate as well as the intrastate business.¹⁵ The controlling factor is that the interstate part of the business is not inconsequential, but is "a continuous, regular and integral part of his everyday and every week business." *McKeown v. Southern California Freight Forwarders*, 52 F. Supp. 331, 333 (S. D. Calif.); see also *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C. C. A. 10); *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8).

We believe that the Administrator's 20% standard (see pp. 16-17, *supra*) is, as the court below observed (R. 342), "a sensible one for the courts to adopt." The meaning of this standard should, however, be clearly understood. It is in no sense a measure of substantiality as that test was applied in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572, and the other cases cited above. Rather, it is an administrative rule of thumb, adopted for enforcement purposes in the particu-

¹⁵ If it is proved that a particular employee did not render any service in connection with the interstate business, or that his duties with respect thereto are only occasional, he would not be covered. According to the better view the burden would be on the employer to produce such evidence. *Guess v. Montague*, 140 F. 2d 500 (C. C. A. 4). See also *United States v. Darby*, 312 U. S. 100, 117-118; *United States v. New York Central Railroad*, 272 U. S. 457, 464. Cf. *contra*, *James v. Reuter v. Walling*, 137 F. 2d 315 (C. C. A. 5), reversed on other grounds, 321 U. S. 671. As noted above (pp. 14-15), the findings established that respondents' duties regularly related to the interstate business carried on in the building.

lar area of office building maintenance employees. As petitioner here points out (Br. 30-32), and as the court below recognized in the later case of *Fleming v. Post*, 146 F. 2d 441, it is plain that to establish that 20% of the tenants (in terms of floor space) are engaged in production is far from establishing that 20% of the building is devoted to production or that 20% of the activity of the tenants is production activity. As the cases cited above show, a firm may be "substantially" engaged in production when far less than all of its activities are of that character. Yet to establish the actual percentage of production activity in a multi-tenant building poses a practical and administrative problem of great complexity. The Administrator accordingly, for enforcement purposes and pending clarification by the courts, proceeds on the working hypothesis that when as much as 20% of a building is occupied by firms substantially engaged in production, then the amount of production activity in the building as a whole—and by the same token the amount of work of the maintenance employees which is related to and necessary to such production activity—will be large enough to meet the test of substantiality developed and applied by the courts. The Administrator's promulgation of the 20% test represents, of course, no more than a statement of his enforcement policy, publicly announced for the convenience of building operators.

everywhere; but we submit that the working hypothesis which it adopts rests upon a rational basis, and might well be accepted by the courts as an adequate guide to the determination of all cases which, like the case here, involve no peculiar factors taking them out of the reason of the rule. But whether or not the Administrator's test is accepted, we submit that on the record here the proportion of production activity carried on in the building is clearly great enough and regular enough to be deemed "substantial," and that the maintenance employees, being regularly engaged in occupations necessary to the performance of such substantial production activity, should be held to be within the coverage of the Act.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APRIL 1945.

APPENDIX

For Release Friday
November 19, 1943

PR-19 (rev.)
(Substitute for PR-19)

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
165 West 46th Street
New York 19, New York

There will be no further enforcement of the wage and hour provisions of the Fair Labor Standards Act in regard to maintenance workers in office buildings occupied by tenants engaged solely in interstate commerce, L. Metcalfe Walling, Administrator, announced last night at a dinner of the Management Division of the Real Estate Board of New York, Inc.

The nationwide administrative policy, which Mr. Walling said becomes effective today, was adopted after recent court decisions which distinguished between maintenance employees in loft buildings in which the tenants produce goods for interstate commerce, who are covered, and similar employees, held not to be covered, who work in office buildings whose tenants only engage "in interstate commerce" rather than engage "in the production of goods for interstate commerce."

Mr. Walling made clear that the administrative policy will remain in effect unless the courts should indicate coverage or until further notice.

but that it was not intended and could not in any way curtail the independent right of employees, under section 16 (b), to bring their own suits to recover whatever compensation may be due them under the Act.

Mr. Walling said:

Following the Supreme Court decision in *Kirschbaum v. Walling*, 316 U. S. 517, the Wage and Hour Division issued release R-1890, dated October 17, 1942, in which it reiterated its opinion that maintenance employees in buildings in which the tenants ~~carried on interstate~~ commerce activities are covered by the Fair Labor Standards Act. It was there pointed out that the Supreme Court, in the *Kirschbaum* decision, had held that maintenance employees working in loft buildings in which the tenants produced goods for interstate commerce are covered by the Act, and it was stated that the Division believed that maintenance employees in buildings in which the tenants carried on interstate activities were similarly covered by the Act.

In view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings, L. Metcalfe Walling, the Administrator of the Wage and Hour and Public Contracts Divisions, announced today that until the courts indicated that the Act applied, or until further notice, he would take no further enforcement action under the wage and hour provisions of the Fair Labor Standards Act, with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce. He

also stated that, in the interests of simplicity and uniformity in the application of this policy, for the present he would not include in the computation of the 20 percent banking firms or other firms whose interstate activities are limited to the preparation and transmission of documents, communications or correspondence, although in his opinion such activities involve production of goods for commerce as defined in the Fair Labor Standards Act and of course involve engaging in commerce.

In this connection, the Administrator called attention to the fact that under the Act, goods are broadly defined to include:

* * * goods (including ships and marine equipment, wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof * * *

and that under the Act production means:

* * * produced, manufactured, mined, handled, or in any other manner worked on in any State, and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

SUPREME COURT OF THE UNITED STATES.

No. 820.—OCTOBER TERM, 1944.

10 East 40th Street Building, Inc.,

Petitioner,

vs.

Charles Callus, Samuel Said, Louis

Saggese, et al.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Second Circuit.

[June 11, 1945.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 regulates wages and hours not only of employees who are "engaged in commerce" but also those engaged "in the production of goods for commerce". Sections 6, 7, 52 Stat. 1060, 1062-63, 29 U. S. C. §§ 206, 207. For the purposes of that Act "an employee shall be deemed to have been engaged in the production of goods if such an employee was employed . . . in any process or occupation necessary to the production thereof, in any State". Section 3(j). When these provisions first came here we made it abundantly clear that their enforcement would involve the courts in the empiric process of drawing lines from case to case, and inevitably nice lines. *Kirschbaum Co. v. Walling*, 316 U. S. 517. And this for two reasons. In enacting this statute Congress did not see fit, as it did in other regulatory measures, *e. g.*, the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce. And "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum Co. v. Walling*, *supra* at 523. Thus, Congress withheld from the courts the aid of constitutional criteria, compare, *e. g.*, *Curran v. Wallace*, 306 U. S. 1; *Wickard v. Filburn*, 317 U. S. 111; *Polish Alliance v. Labor Board*, 322 U. S. 643, as well as the benefit of a prior judgment, on vexing and ambiguous facts, by an expert administrative agency. Compare, *e. g.*, *Labor Board v. Fruehauf Co.*, 301 U. S. 49; *Gray v. Powell*, 314 U. S. 402, 412.

The Act has produced a considerable volume of litigation and has inevitably given rise to judicial conflicts and divisions. The lower courts, and only in a lesser measure this Court, have been plagued with problems in connection with employees of buildings occupied by those having at least some relation to goods that eventually find their way into interstate commerce.

In *Kirschbaum v. Walling*, *supra*, we were concerned with maintenance employees of buildings concededly devoted to manufacture for commerce. In *Borden Co. v. Borella*, decided this day, the Fair Labor Standards Act was invoked on behalf of maintenance employees of a building owned by an interstate producer and predominantly occupied for its offices. Recognizing that the question in every case is "whether the particular situation is within the regulated area", we concluded that the employees of the buildings in the *Kirschbaum* case "had such a close and immediate tie with the process of production" carried on by the lessees as to come within the Act. The *Borden* case involved Borden employees who, if they had been under the same roof where the physical handling of the goods took place, could hardly, without drawing gossamer and not merely nice lines, be deemed not to be engaged in an "occupation necessary to the production of goods" as described by § 3(j). To differentiate, in the incidence of the Fair Labor Standards Act, between maintenance employees who worked in the building where the business of the manufacture of milk products goes on and employees pursuing the same occupation for the Borden enterprise in an office separate from the manufacturing building, is to make too much turn on the accident of the division of the whole industrial process. The case immediately before us presents still a third situation differing both from *Kirschbaum* and *Borden*.

The facts are these. Petitioner owns and manages a 48-story New York office building. The offices are leased to more than a hundred tenants pursuing a great variety of enterprises including executive and sales offices of manufacturing and mining concerns, sales agencies representing such concerns, engineering and construction firms, advertising and publicity agencies, law firms, investment and credit organizations and the United States Employment Service. The distribution of occupancy in relation to the ultimate enterprises of the different groups of tenants was the subject of conflicting testimony and interpretation, but in our view does not call for particularization. Indisputably, the building is devoted

exclusively to offices, and no manufacturing is carried on within it. The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under § 16(b) of the Fair Labor Standards Act for claims of overtime payment to which they are entitled if their occupations be deemed "necessary to the production" of goods for commerce. ~~Concededly~~ they are not "engaged in commerce". The District Court dismissed the suit. 51 F. Supp. 528. The Circuit Court of Appeals reversed. 146 F. 2d 438. By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable area and 48% of the rented area, the maintenance employees of the owners of the building are engaged in occupations "necessary for the production" of goods for commerce. Conflict between this result and that reached by other circuits led us to bring the case here. 324 U. S. ¹

The series of cases in which we have had to decide when employees are engaged in an "occupation necessary to the production" of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Walton v. Southern Package Corp.*, 320 U. S. 540; *Armour & Co. v. Wantock*, 323 U. S. 126; *Skidmore v. Swift & Co.*, 323 U. S. 134. In giving a fair application to § 3(j), courts must remember that the "necessary" in the phrase "necessary to the production" of goods for commerce "is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority." *Kirschbaum Co. v. Walling*, *supra* at 525. For as was pointed out in *Walling v. Jacksonville Paper*

¹ See, e.g., *Johnson v. Dallas Downtown Development Co.*, 132 F. 2d 287; *Cochran v. Fla. Nat. Bldg. Corp.*, 134 F. 2d 615; *Tate v. Empire Bldg. Corp.*, 135 F. 2d 743; *Johnson v. Masonic Bldg. Corp.*, 138 F. 2d 817.

Co., supra at 570, we cannot "be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states". We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.

Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and federal authority, when Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic.

The differences between employees of a building owned by occupants producing therein goods for commerce, and the employees of a building intended for tenants who produce such goods therein, and the employees of the office building of a large interstate producer, are too thin for the practicalities of adjudication. But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts.

We have heretofore tried to indicate the nature of the nexus between employees who, though not themselves engaged in commerce, are engaged in occupations necessary for the production of goods for commerce by describing necessary work that brings the occupation within the scope of the Act as work that had "a close and immediate tie with the process of production". *Kirschbaum Co. v. Walling, supra* at 525. Doubtless more felicitous adjectives could be chosen, but the attempt to achieve a form of words that could avoid an exercise of judgment that a particular occupation is more in the nature of local business than not, is merely to be content with formulas of illusory certainty.

On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse for being narrow if they are drawn on rational considerations. It is a distinction appropriate to the subject matter to hold that where occupations form part of a distinctive enterprise, such as the enterprise of running an office building, they are properly to be treated as distinct from those necessary parts of a commercial process which alone, with due regard to local regulations, Congress dealt with in the Fair Labor Standards Act. Of course an argument can be made on the other side. That is what is meant by a question of degree, as is the question before us. But for drawing the figurative line the basis must be something practically relevant to the problem in hand. We believe that is true of the line drawn in this case.

Judgment reversed.

Mr. Chief Justice STONE.

The views I expressed in my dissent in No. 688, *Borden Company v. Borella*, would, if accepted, control the decision in this case. As those views have been rejected by the Court, I join in the Court's opinion in this case.

Mr. Justice MURPHY, dissenting.

A proper understanding of the nature of the activities carried on in petitioner's 48-story office building in New York City leads to the inevitable conclusion that the respondent maintenance employees, like those in *Kirschbaum Co. v. Walling*, 316 U. S. 517, and in *Borden Co. v. Borella*, decided this day, are engaged in occupations "necessary to the production of goods for commerce" and hence are entitled to the benefits of the Fair Labor Standards Act of 1939.

(1) Approximately 26% of the rentable area of the building is occupied by the executive offices of manufacturing and mining concerns which are concededly engaged in the production of goods for commerce. Corporate policies are formed and directed from these offices. Most of them purchase raw materials for use in the physical processes of manufacturing. They keep in constant and close contact with the factories, supervising all of the manufacturing activities. Some of these offices draft designs and specifications for the articles produced in the factories. Business and sales departments located in these offices do work in connection with the distribution of these products. One office even handles parts for the machines manufactured by the company, doing repair work on the parts and packing and shipping them to out-of-state customers.

The case in this respect is indistinguishable from the facts in the *Borden* case. Here, as in the *Borden* case, the officers and employees working in these offices are part of the coordinated productive pattern of modern industry. The fact that none of the physical processes of manufacturing occurs in the same building is immaterial. Production requires central planning, control, supervision, purchase of raw materials, designing of products, sales promotion and the like as well as the physical, manual processes of manufacturing. These various central offices, then, are "part of an integrated effort for the production of goods," *Armour & Co. v. Wantock*, 323 U. S. 126, 130. And since the maintenance employees stand in the same relation to this productive process as did the employees in the *Kirschbaum* case, it follows that they are engaged in occupations "necessary to the production of goods for commerce."

The *Kirschbaum* case also made it clear that the provisions of the Act "expressly makes its application dependent upon the

character of the employees' activities." 316 U. S. at 524. Hence it is immaterial that the owner of the building which employs the respondent maintenance employees is not shown to have been engaged in the production of goods for commerce. As in the *Kirschbaum* case, it is enough if the employees are necessary to the production of goods by tenants occupying the building in which they work.

(2) Approximately 6.5% of the rentable area of the building is occupied by concerns engaged in writing and preparing mimeographed, photographic and printed matter which is shipped in interstate commerce. One company produces between 15,000 and 20,000 pages of mimeographed materials per week, 90% of which is sent outside the state. Another tenant produces 60 magazines having national circulations. Other concerns produce large quantities of pamphlets, photographs, magazines and advertising matter for interstate shipment.

Since telegraphic messages are "goods" within the meaning of the Act, *Western Union v. Lenroot*, 323 U. S. 490, 502-503, it would seem clear that these magazines, pamphlets, etc. which are prepared in petitioner's office building are likewise "goods." And since the term "produced" includes "every kind of incidental operation preparatory to putting goods into the stream of commerce," *ibid.*, 503, the writing and preparation of these materials constitutes "production of goods" for interstate commerce. Here again the respondent maintenance employees are related to production in the same way as were the employees in the *Kirschbaum* case, thus making it clear that they are covered by the Act from this standpoint.

It is unnecessary to describe the activities of the other tenants, although it is conceded that about 58% of the total rentable area is occupied by concerns not engaged in the production of goods for commerce. It is sufficient that approximately 32.5% of the rentable area is devoted to production. The Administrator of the Wage and Hour Division of the Department of Labor has stated that he will take no enforcement action "with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce." Wage and Hour Division Release, November 19, 1943, P. R.-19 (rev.) Whether 20% occupancy by such firms is a reasonable minimum is not in issue here.

Clearly a 32.5% occupancy is so substantial as to remove any doubt that the maintenance employees devote a large part of their time to activities necessary to the production of goods for commerce. Hence they are covered by the Act.

The starting point in cases of this nature is not to decide whether the activities carried on in the office buildings in question satisfy some nebulous "common understanding of what is local business." The crucial problem, rather, is to determine whether such activities constitute an integral part of the productive process. Once it is clear that the activities are part of the process of production of goods for interstate commerce the interstate character of the activities becomes obvious; and it follows that occupations necessary to those activities partake of their interstate flavor. Neither attenuated analysis nor scholastic logic is necessary to understand the scope and coordination of the modern productive pattern and the integral part played by those who manage and direct the physical processes of production. To apply the Act in light of elementary economic facts is not beyond the ability of judges or beyond the intention of Congress.

Congress plainly intended "to leave local business to the protection of the states," *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570, when it enacted this statute. But there is no indication that it intended to divide the process of producing goods for interstate commerce into interstate and local segments, applying the statute only to the former. And when Congress said that employees "necessary to the production" of goods for commerce were to be included within the Act, it meant just that, without limitation to those who were necessary only to the physical manufacturing aspects of production. Under such circumstances it is our duty to recognize economic reality in interpreting and applying the mandate of the people.

Mr. Justice BLACK, Mr. Justice REED and Mr. Justice RUTLEDGE join in this dissent.

